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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-345

EDDIE DE CURTIS, JOHN VIGNINI and DANIEL FATICO,

Petitioners,

—vs.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioners, Eddie De Curtis, John Vignini and Daniel Fatico, pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in this case on July 7, 1971 (Appendix A. hereto, *infra,* p. 1a).

Opinions Below

Prior to trial, the petitioners moved in the County Court of Nassau County, New York, for an Order suppressing any evidence which may have been secured by the State as the result of wiretapping. By a memorandum order, dated July 19, 1966, the Court directed that the District Attorney of Nassau County "is precluded from offering upon the trial

of this defendant any evidence that may have been directly or indirectly obtained as the product of the execution of any *ex parte* wiretapping order" (Appendix C, hereto, *infra*, p. 8a).

At a hearing, in the midst of the trial herein, the trial court (District Court, Nassau County) issued an opinion in support of its conclusion that the State had "shown probable cause that the evidence in this case is not tainted [i.e., not derived from wiretaps], and the defense, of course, if it desires may call such witnesses as it wishes . . . to show that there were indeed wiretaps which led to the evidence in this case" (Appendix D, hereto, *infra*, pp. 10a, 15a).

At the conclusion of the above noted hearing, the trial court issued an unreported opinion, in support of its determinations that the State's evidence had not initially been derived from wiretapping, but rather from an informer, and that the petitioners were not entitled to the disclosure of the identity of the alleged informer (Appendix E, hereto, *infra*, p. 16a).

At the conclusion of the trial herein, the trial Court issued an unreported opinion in support of its verdict (Appendix G, hereto, *infra*, p. 37a).

The Appellate Term, Second Judicial Department, of the Supreme Court of the State of New York, affirmed the petitioners' convictions in an opinion which is reported at 63 Misc. 2d 246, 311 N.Y.S. 2d 214 (Appendix B, hereto, *infra*, p. 4a).

The Court of Appeals of the State of New York affirmed the petitioners' convictions without opinion. The memorandum report of the affirmance has not yet been published. The remittitur of the Court of Appeals is reproduced in Appendix A, hereto, *infra*, at page 1a.

Jurisdiction

The Order (remittitur of the Court of Appeals of the State of New York), here sought to be reviewed, is dated July 7, 1971 (Appendix A, hereto, *infra*, at page 1a).

That order affirmed, without opinion, a judgment of the Appellate Term of the Supreme Court of the State of New York, Second Department, which affirmed a judgment of the District Court of Nassau County, upon a verdict convicting the petitioners, after a trial without a jury, of the crimes of: Keeping a Disorderly House (Former New York Penal Law, § 1146) and Vagrancy (Former New York Code of Criminal Procedure, § 887[4]).

The petitioners were sentenced to concurrent terms of imprisonment as follows:

Eddie De Curtis—One year
Daniel Fatico —Six months
John Vignini —Two months

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) since the petitioners claim rights, privileges or immunities under the Constitution of the United States (First Amendment: Right to Assemble; Fourteenth Amendment: Due Process and Equal Protection).

Questions Presented

1. May the prosecution sustain its burden of establishing that evidence was not the product of illicit wiretapping, by means of the testimony of a prosecutor that the same evidence was independently derived from an informer whose identity the prosecution will not reveal? Does this not violate a defendant's rights to a fair hearing, confrontation, cross-examination and representation by counsel, all as guaranteed through the Fourteenth Amendment?

2. Within the context of a gathering which is not open to the public and which is not attended by minors, are the Constitutional rights to assemble and of equal protection violated when the host of the gathering is prosecuted solely because his patrons, of the same sex, danced, kissed and touched each other's clothed bodies?

3. Does Section 1146 of the former New York Penal Law (keeping a disorderly house), as applied to the petitioners herein, violate the Fourteenth Amendment?

4. Does Section 887(4) of the former New York Code of Criminal Procedure (vagrancy), as applied to the petitioners herein, violate the Fourteenth Amendment?

Constitutional Provisions Involved

United States Constitution

Amendment I:

> "Congress shall make no law . . . abridging . . . the right of the people to peaceably assemble. . . ."

Amendment XIV:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes Involved

Penal Law of 1909, Section 1146:

§ 1146. *Keeping disorderly houses.*

Whosoever shall keep or maintain a house of ill-fame or assignation of any description or a place for the encouragement or practice by persons of lewdness, fornication, unlawful sexual intercourse or for any other indecent or disorderly act or obscene purpose therein or any place of public resort at which the decency, peace or comfort of a neighborhood is disturbed shall be guilty of a misdemeanor.

When the lessee, proprietor, or keeper of a disorderly house or other building or any other person is convicted under this section, the lease or contract for letting the premises or the part thereof in which such violation occurred shall, at the option of the owner, agent or lessor, become void and the owner, agent or lessor may have the like remedy to recover the possession as against a tenant holding over after the expiration of his term.

Whosoever as owner, agent or lessor shall agree to lease or rent or contract for letting any building or part thereof knowing or with good reason to know, that it is intended to be used for any of the uses or purposes herein prohibited or whosoever as owner, agent or lessor knowingly or with good reason to know permits any house or room or other part of any building or premises of which he may be the owner, agent or lessor to be used in whole or in part for any of the uses or purposes herein prohibited, shall be guilty of a misdemeanor.

Upon conviction of any person for a violation of the provisions of this section, the court before whom such conviction shall have been had, or the clerk of

such court if there be a clerk, shall forthwith make and file in the office of the clerk of the county, in which said conviction shall have been had, a certified statement of said conviction and sentence, if any; and the clerk of said county shall immediately enter in the judgment docket book in said office the amount of the penalty or fine imposed as a judgment against the person so convicted or sentenced.

All persons convicted under this section in all places to which chapter six hundred and fifty-nine of the laws of nineteen hundred and ten applies shall be identified as provided for in section seventy-eight of that chapter. As amended L. 1910, c. 619; L. 1913, c. 591, eff. May 17, 1913. REPEALED. L. 1965, c. 1046, § 2, eff. Sept. 1, 1967.

Revised Penal Law Section 230.25:

§ 230.25 *Promoting Prostitution In The Second Degree.*

A person is guilty of promoting prostitution in the second degree when he knowingly:

1. Advances or profits from prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes; or

2. Advances or profits from prostitution of a person less than nineteen years old.

Promoting prostitution in the second degree is a class D felony. L. 1965, c. 1030, eff. Sept. 1, 1967.

Revised Penal Law, § 230.41:

A person is guilty of permitting prostitution when, having possession or control of premises which he knows are being used for prostitution purposes, he fails to make reasonable effort to halt or abate such use.

Permitting prostitution is a Class B misdemeanor. L. 1965, c. 1030, eff. Sept. 1, 1967.

Code of Criminal Procedure, § 887(4) [*Repealed,* Eff. Sept. 1, 1967]

The following persons are vagrants:

* * * * *

(4) A person who offers to commit prostitution, or (b) who offers or offers to secure another for the purpose of prostitution, or for any other lewd or indecent act; or (c) who loiters in or near any thoroughfare or public or private place for the purpose of inducing, enticing or procuring another to commit lewdness, fornication, unlawful sexual intercourse or any other indecent act; or (d) who in any manner induces, entices or procures a person who is in any thoroughfare or public or private place, to commit any such acts; or (e) who receives or offers or agrees to receive any person into any place, structure, house, building or conveyance for the purpose of prostitution, lewdness or assignation or knowingly permits any person to remain there for such purposes; or (f) who in any way, aids or abets or participates in the doing of any of the acts or things enumerated in subdivision four of section eight hundred and eighty-seven of the code of criminal procedure; or (q) who is a common prostitute who has no lawful employment whereby to maintain herself.

* * * * *

Repealed. L. 1967, c. 681, § 90, eff. Sept. 1, 1967.

Code of Criminal Procedure, § *891-a* [*Repealed*, Eff. Sept. 1, 1967]

Any person convicted of a violation of subdivision four of section eight hundred and eighty-seven of this code, shall be committed by the court or judge to any reformatory or house of refuge or other correctional institution for a period not to exceed three years or to a county jail, penitentiary or other penal institution for a period not to exceed one year, or placed on probation for a period not to exceed three years or, except females between the ages of sixteen and thirty may be committed to the state reformatory for women located at Bedford Hills and known as the Westfield state farm, or to the Western reformatory for women located at Albion, provided, in the case of a person infected with venereal disease, such probation shall be granted only upon such terms and conditions as shall insure medical treatment of such disease and prevent the spread thereof, and no girl or woman shall be placed on probation except to a woman probation officer where available. The provision of this section shall not supersede the provisions of the New York City criminal court act relating to the commitment of convicted persons.

As Amended, L. 1962, c. 698, § 28; *Repealed*. L. 1967, c. 681, § 90, eff. Sept. 1, 1967.

Statement of the Case

The petitioners herein were allegedly associated with the management of a Nassau County Club called the Magic Touch. The club was frequented by homosexuals. Allegedly, persons of the same sex would dance with each other, would kiss each other and would touch each others clothed breasts and clothed genital areas. It was clear that such conduct was limited to a small percentage of

the patrons, that those who allegedly engaged in such conduct were fully clothed and that all such contact, with the exception of kissing, involved the touching of outer clothing only.

Based upon the above, the petitioners were charged by the District Attorney of Nassau County with the following misdemeanors:

(1) Conspiracy to violate § 1146, P.L.;

(2) Keeping a disorderly house—§ 1146, P.L.;

(3) Vagrancy—Receiving persons for purposes of lewdness (§ 887[4][e] C.C.P.);

(4) Being disorderly persons, to wit: keepers of bawdy houses (§ 889[4] C.C.P.).

§§ 1146, P.L., *supra,* p. 5, and 887, C.C.P., *supra,* p. 7, have since been repealed. The petitioners were acquitted upon counts 1 and 4 which involve other statutes.

On July 19, 1966, the County Court of Nassau County decided motions which had theretofore been made by the petitioners for discovery and suppression of any wiretap evidence which formed a part of the case. Based upon the District Attorney's representation that ". . . . no wiretap evidence will be offered in this case", the Court ordered that:

> "The District Attorney is precluded from offering upon the trial of this defendant any evidence that may have been directly or indirectly obtained as the product of the execution of any wiretap order" (Appendix C, hereto, *infra,* p. 9a).

On September 18, 1967, the trial commenced. It quickly became clear that the defendants and the Magic Touch had been the subjects of extensive wiretapping. In view of the prior order which prohibited the use of wiretap evidence,

the Court determined that a hearing would be necessary for the purpose of ascertaining, what part, if any, of the People's trial proof was derived from wiretapping. It appears that the hearing which then ensued was the longest such hearing in the history of Nassau County. It lasted approximately eight weeks and was spread over five thousand pages of transcript.

The State's proof as to the existence of the conduct complained of and as to the relationship of the petitioners to management, was based upon the alleged eyewitness observations of three under-cover detectives who were associated with the District Attorney's office. The Magic Touch was run as a closed club and was not open to the general public. The detectives had gained access to the Magic Touch by fraudulently using as references the names of persons who were known to the management of the Magic Touch (23a).

There were two essential issues to be resolved at the wiretap hearing: 1) Were the authorities induced to concentrate their efforts upon an investigation of the club by virtue of information learned on the wiretaps? and 2) Were the names of the references derived from the wiretapping? The resolution of these issues was almost made impossible by virtue of the fact that, at or about the time of the defense pre-trial motion for suppression of wiretap evidence, the District Attorney's office destroyed the wiretap recordings, without notice to the Court or to the defense (21a-22a).

The testimony at the hearing left no doubt that the District Attorney's staff had learned of the references by means of the wiretapping, and that without these references they could not have entered the club (prior efforts without the references had been without success) (22a-23a). When all appeared lost, the Assistant District Attorney who had

been in charge of the investigation was *recalled,* and testified, for the first time, that an independent source of the information had been an informer who revealed it six days prior to its appearance on the wiretap tapes (20a, 23a-24a). Although the trial court characterized this issue as being ". . . to my mind the most important element of this proceeding. This is the very heart" (H. 4530),* it sustained a prosecution motion that the identity of the informer not be revealed (21a). The Court's rationale was as follows:

> "The motion to suppress the evidence on the grounds that the defense had been deprived of a complete hearing in that it has been unable to call the informer who told Dowling about The Mask is also denied. Although defendants are entitled to the disclosure of information within the knowledge of the prosecution which will assist in presenting a defense, such disclosure is restricted where the public interest is better served by protecting the informer. Thus, 'the necessities of effective law enforcement can prevent the defense from obtaining a pre-trial statement' (*People* v. *Rosario,* 9 N.Y. 2d 286, 290).
>
> "Each case must be examined to determine which interest is entitled to prevail—individual or public. Here the public interest of protecting the informer outweighs the individual interest of *attempting* to locate a witness who, if he testifies truthfully, beyond a doubt will *confirm* the testimony of Dowling and hurt rather than help the defense (*People* v. *Malinsky; People* v. *White; People* v. *Swanberg,* all *supra; People* v. *Ray,* 26 A.D. 2d 560)" (30a).

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* References to the transcript of the hearing are preceded by "H."; references to the transcript of the trial are preceded by "T.".

The unusual and untimely appearance of this *deus ex machina* was, nevertheless, noted by the trial court in its decision at the end of the hearing:

> "Such testimony based upon a conversation with an unidentified informer and *coming at the end of* all the testimony *after* Dowling himself [the Assistant District Attorney] had testified at length has been carefully scrutinized . . . since it rebuts *vital* proof by the defense that wiretaps had furnished the lead to the evidence. The Court has not disregarded the prosecution's lack of enthusiasm in cooperating with the defense in its attempt to prove something solely within the knowledge of the People—that the evidence was tainted." [Emphasis in original]. (23a-24a).

The Court, however, without any corroborative evidence, permitted the nondisclosure of the alleged informant to stand, and accepted the Assistant District Attorney's version, simply because he gave it:

> "Nevertheless, Dowling's testimony stands upon the rock of integrity. With nothing to gain and so much to lose it is unbelievable that this attorney would lie. Exhaustive cross-examination over many days did not shake his testimony. It is that of an honorable man. It is believed" (24a).

It is noteworthy that in so holding, the Court repudiated the very reason which *it* had specified in requiring that the six week hearing be held. When the prosecution had advanced a *different* secret informer as a source of information, as to another aspect of its case, the Court had held:

> ". . . the prosecution cannot set up a confidential informant to prevent the defense from finding out where the information came from insofar as the ascertaining of whether it was due to a wiretap" (T. 267-270).

Having thus concluded the hearing in favor of the prosecution, the Court then continued the trial in chief. At the conclusion of the trial, the Court dismissed Counts I and IV and found each of the defendants guilty upon Count II (keeping a disorderly house—P.L. § 1146) and Count III (vagrancy—C.C.P. § 887[4]). As already noted, both of these statutes have since been repealed.

At the hearing and trial herein, the petitioners challenged the applicability of the statutes in question to the conduct alleged.

Each of the questions presented by this Petition, *supra*, at pp. 3-4 were presented to the Court of Appeals of the State of New York (48a-49a).

Reasons for Granting the Writ

I.

Notwithstanding the length of the wiretap hearing, it was not concerned with the legality of the wiretap procedures. No evidence was introduced in this regard since the State declined to defend those procedures. As noted by the trial Court:

> "Even without *Berger*, no wiretap-based evidence would be admissible in this case because (1) an order prohibiting evidence directly or indirectly based upon wiretaps was entered by County Judge Kelly based upon the People's affidavit in opposition to a motion to inspect the wiretaps that 'no wiretap evidence will be used in this case,' and (2) the People elected to exercise a public policy privilege (*People* v. *Keating*, 286 A.D. 150; 141 N.Y.S. 2d 502; *Richardson on Evidence*, 9th Edition, Section 469) against divulgence of the location of the wiretaps thereby preventing a determination of whether

> a trespass was involved in the tapping of the defendants' phones and relegating the People to a position where wiretaps would not be permitted because of the possible trespass (*Silverman* v. *United States*, 365 U.S. 505).
>
> "However, where, as in this proceeding, the People establish that their evidence was obtained independently of wiretaps, such evidence is admissible (*Nardone* v. *United States*, 308 U.S. 338)" (29a-30a).*

It is, therefore, clear, that if the prosecution's evidence was derived from wiretaps, the petitioners' rights against illegal searches and seizures were violated. The only issue with which the hearing was concerned was whether the prosecution's evidence was so derived.

The Federal Constitutional issue thus squarely presented is whether the State may refuse to reveal the identity of an informer whom it claims supplied information briefly before that same information was gained from unconstitutional wiretaps.

While this Court does not appear to have passed upon this precise issue, we respectfully submit that this Court's prior holdings can leave no other conclusion. If the State can wait until the end of an epic hearing, and then *recall* a prosecutor to give *the first indication* that apparently tainted evidence had previously come from a legitimate source, then the defense should be given a realistic opportunity to verify the truth of such an assertion.

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* These two crucial factors, although clearly discerned by the trial Court, were apparently overlooked by the Appellate Term, which made no mention of them. Instead, the Appellate Term chose to treat the problem *as though it were* one of non-trespassory electronic surveillance, citing *Kaiser* v. *New York*, 394 U.S. 280 (1969), Appendix B hereto, *infra*, p. 6a.

It is true that there exists a limited privilege on the part of the State to keep certain information confidential where doing so would best serve the public interest and law enforcement. That privilege, however, is limited. In *Roviaro* v. *United States,* 353 U.S. 53 (1957), this Court held that:

> "A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." (353 U.S. at 60-61)

See also 8 Wigmore *Evidence*, McNaughton Revision, 1961, p. 768.

In the present case, the identity of the informer was absolutely vital to the defense. Without it, the defendants were helpless. The prosecutor's testimony, coming at the very end of the hearing,* was impossible to rebut without access to the alleged informant.

The totality of the circumstances, including the prosecution's last minute disclosure of the *existence* of an informer, the pre-trial destruction of all wiretap tapes, and

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* In the Courts below, the State has made much of the fact that the defendants were granted more than their share of due process by virtue of the eight-week length of the wiretap hearing. In fact, the hearing was nothing less than the result of the prosecution's efforts to hide the true facts. It was the prosecution that, prior to trial, claimed that no wiretap evidence was involved in the case (Appendix C hereto, *infra,* at p. 9a). It was the prosecution which did not reveal the *existence* of the alleged informer until the end of the wiretap hearing. If this claim had been made at the beginning of the hearing, it would have obviated the need for eight weeks of testimony.

the anonymity which surrounded much of the prosecution's evidence, made it mandatory upon the trial Court to compel disclosure for the purpose of safeguarding the petitioners' Fourth and Sixth Amendment rights.

In *Fahy* v. *Connecticut*, 375 U.S. 85 (1963), this Court adopted a standard for the determination of whether a defendant had been prejudiced by the use of unconstitutionally obtained evidence:

> "The question is whether there is a *reasonable possibility* that the evidence complained of *might have contributed* to the conviction." (375 U.S. 85, 86-87 [emphasis added].)

That standard was reaffirmed in *Chapman* v. *California*, 386 U.S. 18, 24 (1967) and *Harrington* v. *California*, 395 U.S. 250, 254 (1969). We respectfully submit that where the weight of the evidence shows the prosecution's proof to have been derived from an unconstitutional source, the prosecution may not extinquish "a reasonable possibility" of taint by having a law enforcement officer testify that the same evidence was earlier obtained from a legitimate source whose identity the prosecution refuses to reveal.

II.

This case appears to present to this Court a constitutional question of first impression. Where consenting adults touch each other's *clothed* genital areas, within the context of a *private* adult gathering, may such conduct be the subject of criminal prosecution by the State? In passing upon this issue, the Courts below failed to distinguish between a private and a public gathering. Thus, the Appellate Term of the Supreme Court relied for its authority upon the following language in *Matter of Becker* v. *New York State Liquor Authority*, 21 N.Y. 2d 289 (1967):

> ". . . [A] line must be drawn somewhere between which sexual acts are to be permitted in public places and which are not. In our view, the line must be drawn at public feeling of private parts. In this regard, we would not distinguish between the activities of homosexuals and that of heterosexuals. *Fondling of the primary sexual organs in licensed premises on a public dance floor clearly constitutes disorder whether between heterosexuals or homosexuals* under subdivision of 6 of section 196 of the Alcoholic Beverage Control Law." (Appendix B, hereto, *infra*, p. 5a [emphasis as found in opinion of the Appellate Term].)

Yet, the opinions of the trial court make clear that the club "restricted admission" (Appendix E, hereto, *infra*, p. 23a), and a doorman was on duty "whose job . . . was to keep strangers out" (Appendix G, hereto, *infra*, p. 38a).

In the area of obscenity, this Court has recognized a sharp distinction between public and private activities. *Stanley* v. *Georgia*, 394 U.S. 557, 549 (1969). In support of that distinction, the opinion in *Stanley* cited with approval the following extract from the dissent of Mr. Justice Brandeis in *Olmstead* v. *United States*, 277 U.S. 438 (1928):

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." 277 U.S. 438 at 478.

It is to be noted that the evidence in the present case revealed only one instance of solicitation, although the surveillance extended over a period of six months. In that one instance, the management unilaterally and immediately ejected the offending individual (T. 999). The only evidence as to anyone ever complaining about the conduct in this private club was in the form of an anonymous letter, written to the District Attorney more than a year prior to the charges of the present case. (Appendix E, hereto, *infra*, pp. 24a-25a).

In *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), this Court held that the sexual relationship between husband and wife falls within a zone of privacy protected by various guarantees of the Constitution. In the present case, we need not urge that sexual relationships between consenting unmarried adults are necessarily protected to a degree coextensive with the protections afforded married persons. This case does not involve intercourse or other types of climactic experiences or even the touching of exposed sexual organs. One would have to be naive in the extreme not to realize that, at least in present day society, the type of touching involved here is not an uncommon experience between consenting adults. [The fact that the adults were the same sex was considered irrelevant in the State courts, as noted *supra*, at p. .....].

If, as we urge, it is true that consenting, unmarried adults have a constitutional right to engage in this relatively minimal degree of sexual contact, then the only issue remaining is whether they have a right to do so within the confines of a private enclosure in the presence of other adults who do not object to such conduct. In *Coates* v. *Cincinnati*, — U.S. —, 91 Sup. Ct. 1686 (1971), this Court declared unconstitutional an ordinance which made it a criminal offense for three or more persons to assemble on a sidewalk "and there conduct themselves in a manner annoying to persons passing by" — U.S. —, —.

In *Coates*, the activities proscribed by the ordinance were public in nature, yet this Court held:

> "But the vice of the ordinance lies not alone in its violation of the due process standards of vagueness. The ordiance also violates the constitutional right of free assembly and association. Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgement of these constitutional freedoms. * * * [citations omitted]. The first and fourteenth amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people. If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good faith enforcement of a prohibition against annoying conduct. And such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their life style or their physical appearance is resented by the majority of their fellow citizens." — U.S. —, —.

If the above standard is applicable to public gatherings, then *a fortiori* it is applicable to social gatherings of a non-public nature.

If there is a social value which gives the State a right to delimit the circumstances under which individuals may engage in minimal sexual conduct, that value arises from the legitimate interest of the State in protecting minors and in protecting adults who do not wish to be exposed to such conduct. Due to the security measures which were implemented at the club in question, neither of these factors is present in the instant case. The only persons who were admitted to the club and who *may have been* offended by

what they saw were the undercover policemen who gained entry only by means of deceit and found it necessary to spend eight undercover evenings at the club, over a period of seven months, before pressing charges (Appendix G, hereto, *infra*, p. 38a).

III.

We respectfully submit that the penal statutes under which the petitioners were convicted are unconstitutionally vague, as applied to the facts of this case, because they fail to give adequate notice as to what conduct is prohibited.

A. Penal Law, Section 1146

Section 1146 of the former New York Penal Law, provided, in pertinent part:

> "Section 1146—*Keeping disorderly houses*
>
> "Whosoever shall keep or maintain a house of ill-fame or assignation or of any description or *a place for the encouragement or practice by persons of lewdness*, fornication, unlawful sexual intercourse, *or for any other indecent or disorderly act or obscene purpose therein* or any place of public resort at which the decency, peace or comfort of a neighborhood is disturbed shall be guilty of a misdemeanor. . . ." [Emphasis as supplied by the trial Court (Appendix G, hereto, *infra*, p. 42a) and by the Appellate Term (Appendix B, hereto, *infra*, p. 4a) in their respective opinions in the present case].

B. Code of Criminal Procedure, Section 887(4)(e)

Former Section 887(4)(e) of the Code of Criminal Procedure, entitled "Vagrancy", provides, in pertinent part, as follows:

"The following persons are vagrants:

* * * * *

"4. A person . . . (e) who receives or offers or agrees to receive any person into any place, structure, house, building or conveyance for the purpose of prostitution, lewdness or assignation or knowingly permits any person to remain there for such purposes. . . ."

C. Prior and Subsequent Applications of the Statutes In Question

In the courts below, neither of the parties were aware of any prosecution which had been maintained in New York under these statutes predicated upon the type of activity involved in the present case. Neither of the Courts which passed upon the issue cited any such precedent. Indeed, the Appellate Term of the Supreme Court found it necessary to resort to interpretations of a *licensing* statute as its only authority for the proposition that fondling of the primary sexual organs constitutes a "disorder" (Appendix B, hereto, *infra*, p. 5a).

Shortly after the events of the present case, both of the above statutes were repealed by the New York Legislature (*supra*, pp. 5-6, 7). In accord with what appears to be the clear intent of Section 1146 of the Penal Law, it was replaced by Sections 230.25 and 230.41 of the Revised Penal Law. These new statutory provisions are directed only against *prostitution* (*supra*, pp. 6-7).

D. The Statutes Are Unconstitutionally Vague

This Court has made clear that the due process requirement of definiteness is violated by a criminal enactment that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. *United States* v. *Harriss*, 347 U.S. 612 (1954);

Wright v. *Georgia*, 373 U.S. 284 (1963); *Bouie* v. *Columbia*, 378 U.S. 347 (1964); *Coates* v. *Cincinnati*, — U.S. — (1971).

An examination of the statutes under which these petitioners were convicted, reveals that they are primarily concerned with the circumstances under which the sexual act is sought to be consummated, i.e., elicit intercourse. There are thrown in, as catch-all provisions, prohibitions against "lewdness", "encouragement or practice . . . of lewdness", and "any other indecent or disorderly act or obscene purpose." Within the context of the thrust of each of these statutes, a reasonable person would assume that these are references to conduct geared to the consummation of the sexual act, rather than to casual touchings of clothed persons. In any event, even if the quoted phraseology stood alone in the statute, it would not make clear exactly what type of conduct is proscribed.

In *Hunter* v. *Allen*, 286 F. Supp. 830 (N.D. Ga., 1968), aff'd. 422 F.2d 1158 (5th Cir., 1970), the Court held unconstitutional that portion of an Atlanta municipal ordinance proscribing the use in the presence of another of "bawdy, lewd or obscene" words. In *Pritkin* v. *Thurman*, 311 F. Supp. 1400 (S.D. Fla., 1970), the Court declared unconstitutional a North Miami municipal ordinance prohibiting the wilful use of "profane, obscene, or offensive language, calculated to provoke a breach of the peace." Similarly, in *Original Fayette Co. Civic & Welfare League* v. *Ellington*, 309 9F. Supp. 89 (W.D. Tenn., 1970), a three-judge court held unconstitutional a Tennessee statute making illegal the use of "rude, boisterous, offensive, obscene or blasphemous language in any public place." *See also*: *Brooks* v. *Briley*, 274 F. Supp. 538, 555-556 (M.D. Tenn., 1967—concurring opinion); *Carmichael* v. *Allen*, 267 F. Supp. 985, 987-999 (N.D., Ga., 1967); *Delta Book Distributors, Inc.* v. *Cronvich*, 304 F. Supp. 662 (E.D., La., 1969).

In *Livingston* v. *Garmire*, 437 F.2d 1050, at 1056 (5th Cir., 1971), a statute which prohibited the use of obscene, profane and indecent language was held to be unconstitutional upon the ground that ". . . use of the terms 'obscene,' 'profane,' 'abusive,' etc,, does not provide the fair warning to the public that due process requires." See also the dissenting opinion of Mr. Justice Black, in which Mr. Justice Douglas joined in *Edelman* v. *California*, 344 U.S. 357, at 362-366 (1953).

We respectfully submit that these statutes are so vague in their attempt to proscribe lewdness, indecency and obscene purposes, that a reasonable person who is otherwise uncommitted to a narrow moral view as to sexual conduct, is not guided by the statute as to the type of conduct which is prohibited. For this reason, these statutes contravene the due process requirements of the Fourteenth Amendment of the United States Constitution.

CONCLUSION

For all of the above reasons, the joint petition for a writ of certiorari should be granted as to each of the petitioners.

Respectfully submitted,

HENRY J. BOITEL,
Attorney for Petitioners,
EDDIE DE CURTIS
JOHN VIGNINI
DANIEL FATICO

APPENDIX A

Remittitur of the New York Court of Appeals

No. 230 Form 8

(1971)

COURT OF APPEALS

State of New York, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and seventy-one, before the Judges of said Court.

WITNESS,

THE HON. STANLEY H. FULD,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, Clerk.

REMITTITUR ..... July 7, 1971

App. T. 2. No. 230. 71

THE PEOPLE &c.,

Respondent,

vs.

EDDIE DE CURTIS, & ors.,

Appellants.

Appendix A

Remittitur of the New York Court of Appeals

BE IT REMEMBERED, That on the 10th day of May in the year of our Lord one thousand nine hundred and seventy-one, Eddie De Curtis, & ors., the appellants in this cause, came here unto the Court of Appeals, by Henry J. Boitel, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgments of the Appellate Term of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by William Cahn, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Henry J. Boitel, of counsel for the appellants, and by Mr. Henry P. DeVine, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgments herein be and the same hereby are affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the District Court, Nassau County, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgments be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the District Court, Nassau County, before the Judges thereof, according to the form of the statute in such case made and provided, to be en-

Appendix A

Remittitur of the New York Court of Appeals

forced according to law, and which record now remains in the said District Court, before the Judges thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the
State of New York.

Court of Appeals, Clerk's Office,
Albany, July 7, 1971.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON

(Seal of the Court) Clerk.

APPENDIX B

Memorandum Opinion of the Appellate Term of the Supreme Court, Second Judicial Department

Supreme Court, Appellate Term, Second Department

May 6, 1970

MEMORANDUM

PER CURIAM.

Judgments of conviction unanimously affirmed.

Defendants were charged with keeping a disorderly house during 1964 and 1965, in violation of section 1146 of the former Penal Law, and of vagrancy, in violation of former section 887 of the Code of Criminal Procedure.

Section 1146 of the former Penal Law provided in pertinent part:

> "§ 1146. *Keeping disorderly houses.*
>
> Whosoever shall keep or maintain a house of ill-fame or assignation of any description or *a place for the encouragement or practice by persons of lewdness,* fornication, unlawful sexual intercourse *or for any other indecent or disorderly act or obscene purpose therein* or any place of public resort at which the decency, peace or comfort of a neighborhood is disturbed shall be guilty of a misdemeanor. . . ." (Emphasis supplied.)

Former Section 887 of the Code of Criminal Procedure defined a vagrant as follows:

> "4. A person * * * (e) who receives into any place, structure, house, building or conveyance for

Appendix B

Memorandum Opinion of the Appellate Term of the Supreme Court, Second Judicial Department

the purpose of prostitution, *lewdness* or assignation or knowingly permits any person to remain there for such purposes * * *." (Emphasis supplied.)

There is ample evidence in this voluminous record to establish defendants' guilt of both charges beyond a reasonable doubt. The testimony of the police officers was uncontroverted. On eight separate occasions they made personal observations inside the Magic Touch, a restaurant in Island Park, Nassau County, where thy observed lewd, indecent and disorderly homosexual activities within the condemnation of both statutes.

In *Matter of Becker* v. *New York State Liquor Authority* (21 N Y 2d 289), cited by both sides, the conduct of the patrons was quite similar to that here involved. Although that case concerned itself with the suspension of a liquor license under the Alcoholic Beverage Control Law, the language of the Court of Appeals is particularly approps. Said the court (at p. 292):

> ". . . [A] line must be drawn somewhere between which sexual acts are to be permitted in public places and which are not. In our view, the line must be drawn at public feeling of private parts. In this regard, we would not distinguish between the activities of homosexuals and that of heterosexuals. *Fondling of the primary sexual organs in licensed premises on a public dance floor clearly constitutes disorder whether between heterosexuals or homosexuals* under subdivision 6 of section 196 of the Alcoholic Beverage Control Law." (Emphasis supplied.)

Appendix B

Memorandum Opinion of the Appellate Term of the Supreme Court, Second Judicial Department

It is to be noted that former section 887 of the Code of Criminal Procedure applied equally to prostitutes and homosexuals. Subdivision 4 thereof encompassed within its language lewd conduct of homosexuals (*People* v. *Hale*, 8 N Y 2d 162).

We find no merit in the contention that a dismissal of the informations is mandated because of an alleged spoliation of vital items of evidence. The destruction of blank negatives of photographs and wiretap tapes, under the circumstances related at the trial, could in no way affect the innocence or guilt of the defendants or give rise to any inference, one way or another, and in fact involved no evidence at all. Hence there was no spoliation of evidence in the accepted sense.

Nor is there any merit to the argument based upon the People's alleged use of evidence obtained directly or indirectly through illegal wiretaps. It is clear from the record that the judgments of conviction are not bottomed upon wiretap evidence but rather upon information given to the police shortly prior to the issuance of the wiretap orders and upon the personal observations of eye-witnesses who testified at the trial. The situation at bar is readily distignuishable from *People* v. *Betts* (272 App. Div. 737, affd. 297 N.Y. 1000), cited by defendants, where the evidence was based entirely on wiretaps which were destroyed. In any event, even if the wiretaps had been used or relied upon, which is not the case here, they would afford no basis for invalidating the convictions (*People* v. *Kaiser*, 21 N Y 2d 86, affd. 394 U.S. 280).

The trial court's failure to compel the identity of an informer was neither prejudicial nor a denial of due process. The conviction of the defendants was based upon the eye-witness' testimony of three detectives and not upon any

Appendix B

Memorandum Opinion of the Appellate Term of the Supreme Court, Second Judicial Department

information supplied by the alleged informer. In these circumstances, non-disclosure cannot be said to have deprived the defendants of a fair trial (see *People* v. *Malinsky*, 15 N Y 2d 86, 93-94).

The further point is made that the trial court lacked jurisdiction to try the informations and impose sentence, predicated upon the alleged failure of the Grand Jury of Nassau County to indict the defendants. Sufficient appears herein to indicate that the Grand Jury did not consider any evidence relating to the charges under consideration but concerned itself with another crime. The County Clerk's certificate indicated that there had been no indictment or dismissal by the Grand Jury. It is noted that the dismissal of a charge must be evidenced by definite action on the part of the Grand Jury in accordance with the requirements of Section 269 of the Code of Criminal Procedure (*People* v. *Kelly*, 140 Misc. 377).

Defendants' final argument is that the trial judge should not have presided both at the hearing on the motion to suppress evidence and at the trial. Since this was a non-jury trial, it suffices to say that there is no prohibition against the same Judge conducting a pre-trial hearing as well as the trial itself (see *People* v. *Brown*, 24 N Y 2d 168; *People* v. *Sykes*, 22 N Y 2d 159).

Upon the entire record, we are satisfied that the trial court was most meticulous in safe-guarding the constitutional rights of the defendants and that their guilt was established beyond a reasonable doubt.

APPENDIX C

Opinion of County Court of Nassau County on Motion to Inspect Wiretap Orders

COUNTY COURT — NASSAU COUNTY

SPECIAL TERM: PART I

Motion Cal. #C-507

Present: HON. PAUL KELLY,
County Judge.

PEOPLE OF THE STATE OF NEW YORK

—against—

EDDIE DE CURTIS, a/k/a EDDIE TOY

Defendant

HON. WILLIAM CAHN
District Attorney
Nassau County
Mineola, New York

GEORGE E. MULRY, ESQ.
Attorney for Defendant
1551 Franklin Ave.
Mineola, N. Y.

This is an application by defendant for an Order authorizing the inspection of any ex parte "wiretap order" as may have been issued by this Court and through which evidence was obtained against defendant, and to suppress

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Opinion of County Court of Nassau County on Motion to Inspect Wiretap Orders

any evidence secured against this defendant as the result of the execution thereof.

In opposition to this motion the District Attorney has stipulated ". . . that no wiretap evidence will be offered in this case".

Upon the affidavit and stipulation of the District Attorney that evidence will not be offered against this defendant which had been secured by virtue of a wiretap order, it is

ORDERED, that the motion of defendant Eddie De Curtis to inspect any ex parte wiretap order issued by this Court, is denied, and it is further

ORDERED, that upon the stipulation of the District Attorney, the District Attorney is precluded from offering upon the trial of this defendant any evidence that may have been directly or indirectly obtained as the product of the execution of any ex parte wiretap order.

Enter

Dated: July 19, 1966

PAUL KELLY
C.J.

APPENDIX D

Opinion of District Court of Nassau County as to Burden of Proof

DISTRICT COURT OF THE COUNTY OF NASSAU

FIRST DISTRICT: MINEOLA, N. Y.

Index No. CR-1430/65
CR-1431/65
CR-1432/65

THE PEOPLE OF THE STATE OF NEW YORK

—against—

EDDIE DE CURTIS, JOHN VIGNINI and DANIEL FATICO,

Defendants.

Before: HON. JOHN S. LOCKMAN,
District Court Judge

APPEARANCES:

WILLIAM CAHN, ESQ.,
District Attorney, Nassau County
Mineola, N. Y.

By: WILLIAM DILLON, ESQ.

GEORGE MULRY, ESQ.,
Attorney for Defendant De Curtis
1551 Franklin Avenue
Mineola, N. Y.

PHILIP VITELLO, ESQ.,
Attorney for Defendants Fatico and Vignini
50 Court Street
Brooklyn, N. Y.

Appendix D

Opinion of District Court of Nassau County as to Burden of Proof

The Court: The threshold problem which the Court has been asked to render a decision on is who has the burden of proof where wire tap evidence exists and may have furnished leads to the evidence in the case. Prior to the United States Supreme Court decision in *Mapp* v. *Ohio,* illegally obtained evidence was admitted in the Courts of this state. In the *Mapp* case the United States Supreme Court said that the Federal exclusionary rule that illegally obtained evidence could not be used in any Court of Law applied to the states. New York State then was faced with the manner in which it would proceed. The legislature enacted Section 813-c of the Code of Criminal Procedure, and the sections following it, under title II-b, but they left to the Courts the question of who had the burden of proof. Then there were a series of cases: *People* v. *Sherry,* 43 M2d, 521; *People* v. *Grossman,* 45 M2d 557; *People* v. *McCall,* 17 N.Y.2d 152, in which the Courts of this state acknowledged that there was an inherent right to suppress regardless of Section 813-c. In *People* v. *McCall* at page 157, the Court stated: "It is open to some doubt whether the statutory remedy afforded by Section 813-c of the Code of Criminal Procedure dealing with unlawful searches and seizures, should apply to eavesdropping under the aegis of an order of a Judge who has power to make it. The section seems to have no literal application.

"Suppression is not a fully effective way to deal with testimony which will come in narrative form. This may require rulings of evidentiary exclusion. The normal way to proceed in the situation presented by this Code would be to decline to receive the evidence obtained by eavesdropping. See following. CPLR 4506."

As a matter of fact, the Court of Appeals has gone so far as to say that Section 813-c would not apply where

Appendix D

Opinion of District Court of Nassau County as to Burden of Proof

a defendant pled guilty because of wire tap evidence and then appealed. They made this decision in *People* v. *Habel,* 18 N.Y.2d 148. So, the Court is faced with a determination of the procedure to be followed in this case, and examining the two possibilities: (1) following the procedure that has been established by the Courts under Section 813-c, which is set forth in *People* v. *Lombardi,* 18 App. Div. 2d 177, as modified by *People* v. *Malinsky,* 15 N.Y.2d 86, and (2) where you apply the standards at Common Law that the person attacking the evidence would have the burden of proof, this Court must make an election.

The election that the Court makes is that it will follow the rules of procedure established under Section 813-c. I am sure these rules are clear to the attorneys in this lawsuit, but so that there can be no misunderstanding, I will read from the famous footnote at page 91: "The People in order to prevail are under the necessity of going forward in the first instance with evidence to show that probable cause existed both in obtaining a search warrant and sustaining the legality of the search made without a warrant as incident to an arrest."

In other words, applying it to this case, the People in order to prevail are under the necessity of going forward in the first instance with evidence to show that the evidence to be introduced was not tainted. So much for the procedural question.

* * * * *

The Court: I have heard arguments on both sides and the question that I must now determine is whether the People have come forward and shown probable cause to believe that the evidence that they are going to present in this case is not tainted by reason of a large number of wire tap orders.

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Opinion of District Court of Nassau County as to Burden of Proof

To meet this burden the People called the District Attorney, the Chief Assistant, the Assistant in charge of this investigation, and the detective who made the complaint in this case. They also produced 15 wire tap orders and two unsigned wire tap orders relating to the defendants, or the premises, or people who were indicated would be witnesses in this case together with summaries of the alleged tapes, the affidavits and testimony which formed the bases for the granting of the orders.

The District Attorney testified that he directed his assistant in charge of racket investigations to put men into the Magic Touch after he had received certain correspondence which is in evidence. The Assistant District Attorney, Norman Levy, who was the head of the Rackets Bureau testified that he examined the correspondence People's Exhibit 23-A, which was a letter dated January 10, 1964, which has been admitted into evidence for purposes of this motion only and the letter provides, after complaining about the Long Beach Inn that . . . "they also have operating next door to them in the Magic Touch what I think you might call a lesbian house which constitutes a large percentage of their business. I have not only seen this with my own eyes but heard about it from authoritative sources. In my estimation I feel this bears some investigation. I think it is a shame that decent people and their children should be permitted or subjected to this type of lodging." Signed, a concerned taxpayer.

Mr. Levy also examined Exhibit 25 in evidence for purposes of this motion only, a letter dated May 2, 1964, which stated:

"Mr. District Attorney: We request your office investigate certain cocktail lounge on Austin Boulevard called The Magic Touch. In the past several months this so-

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Opinion of District Court of Nassau County as to Burden of Proof

called supper club has become a meeting place for queers, lesbians and minors trying to make some easy money catering to the wants of these people. This bar allows dancing, petting and necking with one's own sex. It is not unusual to see two men or women sitting in a corner kissing and using their hands for immoral actions. These people even have sex in their cars in the parking lot. The Magic Touch was divided into two rooms, the outer is the bar which looks perfectly normal. The back room is used for dancing. There is a light switch in the outer room which controls certain bright lights in the dance room. Whenever the local police enter the lights are switched on in the back room, which is a signal to stop the unnatural acts. There is quite a few minors going there using false proof of age. These queers also ride up and down Austin Boulevard picking up young people and bringing them to the Magic Touch. The hotel in back of the Magic Touch does a pretty good business too. We think the local police must know about what goes on there. Why they have done nothing about it we don't know. The Magic Touch is busiest on Friday, Saturday and Wednesday nights. We have found out about this place by dressing like queers and going there ourselves. What we have written in this letter are things we have seen ourselves. We hope this matter will be investigated and alleviated. A place like the Magic Touch in this community will only lead to trouble. We thank you for your time and trouble. Sincerely.

/s/ A Citizens' Co."

Now, in addition to these letters, Mr. Levy examined activity sheets which are in evidence as Defendants' Exhibit E. They show that on the 5th of March, 1964, Captain Schuchman and Detective Gillings, saw queers at the Magic Touch and that on the 9th of March, 1964, the activity sheet, which is Exhibit 26 in evidence, shows that the detectives went to the premises and they found no evidence for this case. On the 4th of June, 1964, Exhibit E, the

Appendix D

Opinion of District Court of Nassau County as to Burden of Proof

activity sheet, shows Detectives Harrer and Duhigg went to the Magic Touch, saw several males with female tendencies, and on the next night, June 5, 1964, Exhibit E again shows that Detectives Harrer and Duhigg were refused admission to the Magic Touch, and on the 26th of that month, 1964, the same exhibit shows activity negative; but Exhibit 26 in evidence shows that Detective Abramowicz and Detective Beach were refused admission but queer-looking customers were charged $3 and admitted to the premises. They identified themselves as detectives and were admitted and they noticed many oddballs. On the 2nd of July, 1964, and the 4th of July, 1964, activity sheet, Exhibit 26, shows that the investigation was negative and on the 10th of July, 1964, they noticed that the lights went on in the back room of the Magic Touch, so that what the People have come forward and shown at this time is that they had received correspondence and had conducted an investigation and on the basis of this, Assistant District Attorney Levy upon the instructions of the District Attorney ordered undercover men to enter the premises.

I conclude that the People have now come forward and shown probable cause that the evidence in this case is not tainted, and the defense, of course, if it desires may call such witnesses as it wishes or offer such proof as it may desire to show that there were indeed wire taps which led to the evidence in this case. I might add that the testimony of any witness will be examined where it is shown that wire tap evidence might have led to that witness. This is in accordance with the C.P.L.R. relating to wire taps.

So, to specifically answer your question, Mr. Vitello, I'm ruling that the People need not produce the three detectives who made the taps, but you certainly may have them called as your witnesses if you so desire.

* * * * *

Dated at Mineola, N. Y.
October 17, 1967

APPENDIX E

Opinion of District Court of Nassau County on Motion to Suppress Wiretap Evidence

DISTRICT COURT OF THE COUNTY OF NASSAU

FIRST DISTRICT: MINEOLA, N. Y.

Index Nos. CR-1430/65
CR-1431/65
CR-1432/65

THE PEOPLE OF THE STATE OF NEW YORK

—against—

EDDIE DE CURTIS, JOHN VIGNINI and DANIEL FATICO,

Defendants.

Before: HON. JOHN S. LOCKMAN,
District Court Judge

DECISION ON MOTION

APPEARANCES:

WILLIAM CAHN, ESQ.,
District Attorney, Nassau County
Mineola, N. Y.
By: WILLIAM DILLON, ESQ.

GEORGE E. MULRY, ESQ.,
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1551 Franklin Avenue
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PHILIP VITELLO, ESQ.,
Attorney for Defendants Fatico and Vignini
50 Court Street
Brooklyn, New York

Appendix E.

Opinion of District Court of Nassau County on Motion to Suppress Wiretap Evidence

PROCEDURE

During a non-jury trial for maintaining and conspiring to maintain a disorderly house from January 1, 1964, to June 7, 1965, in violation of Sections 1146 and 580 of the Penal Law and Section 899 of the Code of Criminal Procedure it developed that: (1) testimony had been taken before the Grand Jury concerning the defendants and the operation of the premises in question and (2) there were 12 wiretap orders concerning the defendants and prospective witnesses covering a period from July 10, 1963, to July 22, 1965.

The defendants moved to dismiss for lack of jurisdiction because the People had not produced any Court Order directing the submission of the case to a Court of Special Sessions after a dismissal by the Grand Jury pursuant to Sections 269 and 270 of the Code of Criminal Procedure. The People produced a certificate by the County Court Clerk providing that "no dismissals of charges against Edward DeCurtis, John Vincent, a/k/a John Vignini and Daniel Fatico have been filed in the County Court of Nassau County by any Nassau County Grand Jury during the period checked," which was from January 1, 1959, to September 15, 1967 (People's Exhibit 13 in evidence). The defense requested time to submit authority. Accordingly decision was reserved on this motion.

Since this was the first knowledge the defense had of the wiretap orders they were permitted to move to suppress evidence obtained thereby pursuant to Section 813-c of the Code of Criminal Procedure and under the inherent right to make such a motion at common law (*People* v. *McCall,* 17 N.Y.2d 152; *People* v. *Habol,* 18 N.Y.2d 148; *People* v. *Sherry,* 43 Misc. 2d 521; *People* v. *Grossman,* 45 Misc. 2d 557).

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Opinion of District Court of Nassau County on Motion to Suppress Wiretap Evidence

The hearing on this motion took eight weeks. First, the People were required to come forward with evidence to show that there was no probable cause to believe that the evidence to be introduced at the trial was based directly or indirectly upon wiretaps. They called the District Attorney, his assistant in charge of investigations and the detective who laid this information. They also produced for the defense to examine 12 executed and two unexecuted wiretap orders relating to the defendants, the premises or prospective witnesses, together with the affidavits and testimony used to obtain the wiretap orders and all summaries in their possession of conversations overheard pursuant to the wiretap orders. They also called police and District Attorney personnel to explain efforts to locate missing tapes and summaries.

The District Attorney testified that he directed his investigations chief to put men into the premises in question after receipt of letters complaining of lesbians and "queers" (People's Exhibit 23-A, 25 in evidence). The investigations chief testified that he reviewed the complaint letters and People's Exhibit 26, Defendants' Exhibit E, both in evidence, which were police activity sheets showing observations of many patrons of the premises who appeared to be "queer" over a period from March 5 to July 10, 1964, and on the direction of the District Attorney ordered undercover men into the premises on November 13, 1964.

The defense was then required to prove by a preponderance of the evidence the inadmissibility of the evidence to be introduced at the trial because it was based directly or indirectly upon wiretaps (*People* v. *Lombardi,* 18 A.D.2d 177 as modified by *People* v. *Malinsky,* 15 N.Y.2d 86, 91, Footnote 2).

Appendix E

Opinion of District Court of Nassau County on Motion to Suppress Wirctap Evidence

They called the three detectives who listened to the tapes and the Assistant District Attorney in the Investigation Bureau who was in charge of a parallel investigation and who had obtained the taps, and they introduced into evidence most of the wiretap orders, all of the 1964 summaries of wiretap conversations produced by the People and some of the statements given to the police. They were permitted to cross-examine the witnesses as compulsory witnesses (*Richardson on Evidence*, 9th Edition, Section 525).

The People were also required to produce for examination by the defense all statements, Grand Jury testimony of every witness and anything which (1) would refresh the witness' recollection or (2) was of an exculpatory nature or (3) would assist the defense in its defense or (4) would tend to establish that any evidence was obtained in violation of the constitutional rights of the defendants pursuant to *People* v. *Rosario*, 9 N.Y.S.2d 286; 213 N.Y.S.2d 448; *People* v. *Agron*, 10 N.Y.2d 130; *People* v. *Miller*, 257 N.Y. 54, and the broad language of *People* v. *Walsh*, 262 N.Y. 140, 150: "The state has no interest in interposing any obstacle to the disclosure of the facts unless it is interested in convicting accused parties on the testimony of untrustworthy persons."

At the request of the District Attorney who wished to avoid the possible commission of a crime under Section 215.70 of the Penal Law which prohibits disclosure of Grand Jury testimony except in the proper discharge of official duties or upon written order of the Court, this Court made application to the County Court for such a written order which was obtained.

After introducing testimony that there were no wiretap orders other than those produced, the People were not re-

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quired to produce their list of wiretap orders because of the privilege protecting official information (*People* v. *Keating*, 286 A.D. 150; 141 N.Y.S.2d 562; *Richardson on Evidence*, 9th Edition, Section 468).

Once it was determined that these lists of wiretap orders were readily identifiable should an appellate court wish to examine them if that stage were ever reached, the People's representation that these lists were of such a confidential nature that not even the Court should see them was accepted at face value.

The application by the defense for the production of Grand Jury testimony of witnesses not called (although their names and addresses were made available to the defense) for the purpose of establishing perjury by those witnesses was denied. The reason for the denial was that those witnesses were indicted for perjury and the People conceded that this alleged perjury was the denial of remembering ever reporting to law enforcement that the defendant DeCurtis said he owned the premises in question. This report had been introduced to show that the People knew, independently of the wiretaps which also revealed this information, that DeCurtis owned the subject premises. The defense's argument that it need not call the witnesses prior to the production of their testimony, as suggested by the Court, because those witnesses would refuse to testify on the grounds that their testimony might tend to incriminate them was rejected as speculative.

A former Assistant District Attorney was permitted to testify, over objection by the defense, to a conversation with an informer without revealing the identity of that informer even though he had never furnished information before because the information supplied on this occasion was subsequently confirmed (*People* v. *Malinsky*, 15 N.Y.2d

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86; *People* v. *White*, 16 N.Y.2d 270; *People* v. *Swanberg*, 16 N.Y.2d 648).

Decision was reserved on a motion by the defense that the informer be identified so that he could be produced as a defense witness on a vital issue, the burden of which rested with the defense—proving that the evidence to be introduced at the trial was not based upon the alleged informer's conversation but, instead, was based upon wiretaps.

Decision was also reserved on a motion by the defense for a mistrial because of prejudicial material included in the evidence which the defense was required to produce to attempt to sustain its burden of proving that the evidence to be used at the trial was based upon wiretaps.

Before ruling on the issues thus presented, it is necessary to make the following:

FINDINGS OF FACT

The crimes charged allegedly occurred between January 1, 1964, and June 7, 1965. Six months before, during, and a year after this period 12 wiretap orders were obtained against the defendants, prospective witnesses or the subject premises, the Magic Touch. The 1963 wiretaps were obtained as part of an investigation into possible prostitution at the Magic Touch. The other wiretaps were obtained to assist in an investigation of a fire which destroyed The Flame, a competitor of the Magic Touch whose owners were suspect of the arson.

A search everywhere the tapes and transcripts could be kept was unsuccessful. They were never found. An explanation was offered for each set of tapes: the 1963 tapes were lost when the Detective Squad responsible was

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transferred from the District Attorney's office to Police Headquarters; the 1964 tapes were ordered erased, were last seen in the erasure room and presumably were erased in accordance with the custom of erasing useless tapes in order to use them again and because the District Attorney did not "want to perpetuate conversations of negative tapes." No tapes were made in 1965 because the calls were "live monitored."

No transcripts were found and no one recalled making any. However, summaries of the tapes were produced for the 1963 and 1964 wiretaps. The 1964 summaries were introduced into evidence by the defense. They dramatize the scope of wiretaps. One hundred and sixty summaries were made, many of which were several pages long. In addition to much gossip, personal information and irrelevant material, they revealed that lesbians and homosexuals frequented the Magic Touch where the defendant Vignini was the bouncer and which was under the control of the defendant DeCurtis, who also controlled other "restaurants," The Mask, one in Staten Island, possibly Baps. They also showed that "Danny" (same first name as the defendant Fatico) apparently worked as a tailor during the day and had some connection with the Magic Touch, that "Jiggst" was the bartender at The Mask and that Pitsy, May Bush, Lorraine "Laurie" Todero apparently worked for DeCurtis.

The most important information revealed by the tapes was notations of conversations overheard on the telephone at the DeCurtis residence set forth in Exhibit M:

> "Summary 80, Oct. 14, 1964, OUT MO 6-4200. Male (Barry) '4200,' Hello Barry, he's on his way, OK.

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"Summary 82, Oct. 16, 1964. OUT Theresa calling MO 6-4200. 4200 Barry, Eddie on phone, heard she was looking for him will be home. 255-6356 (Eddie DeCurtis brothers)."

This was vital information because MO 6-4200 was the telephone number of the Mask, and the next day, on October 17, 1964, Detectives Sondergaard and Eberhardt went to The Mask to see DeCurtis and while there Eberhardt learned that "Jiggs" was the bartender and "B.J." worked there. This information furnished the key to Eberhardt's subsequent undercover entry into The Magic Touch, which restricted admission, because the doorman refused him admission until he told him that he knew "Jiggs" and "B.J." from The Mask.

However, a former Assistant District Attorney, Dowling, rebutted the implication that the wiretaps led the prosecution to The Mask. He testified that an informer, whose identity he refused to reveal, told him on October 8, 1964—six days before the information was received from the wiretaps—that the defendant DeCurtis was opening the Mask, a bar for homosexuals; B.J. was the bartender and Maggie Jiggs, another employee, was a male who impersonated females or vice versa; Pitsy ran the Mask and the Magic Touch; B.J. was her chauffeur; when Pitsy was not at the Magic Touch John Vignini ran it.

Such testimony based upon a conversation with an unidentified informer and *coming at the end* of all testimony *after* Dowling himself had testified at length has been carefully scrutinized since it rebuts *vital* proof by the defense that wiretaps had furnished the lead to the evidence. The Court has not disregarded the prosecution's lack of enthusiasm in cooperating with the defense in its

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attempt to prove something solely within the knowledge of the People—that the evidence was tainted.

Nevertheless, Dowling's testimony stands upon the rock of integrity. With nothing to gain and so much to lose it is unbelievable that this attorney would lie. Exhaustive cross-examination over many days did not shake his testimony. It is that of an honorable man. It is *believed.* Actually the People were well-informed about the defendants independently of any wiretaps. In the winter of 1964 an anonymous letter described a "lesbian house" at the Magic Touch. A second letter gave details:

"May 2, 1964

"Mr. District Attorney,

"We request your office investigate a certain cocktail lounge on Austin Boulevard called the Magic Touch. In the past several months, this so called supper club has become a meeting place for queers, lesbians and minors trying to make some easy money catering to the wants of these people. This bar allows dancing, petting and necking with ones own sex. It is not unusual to see two men or women sitting in a corner kissing and using their hands for immoral actions. These people even have sex in their cars in the parking lot. The Magic Touch is divided into two rooms, the outer room is the bar which looks perfectly normal. The back room is used for the dancing, there is a light switch in the outer room which controls certain bright lights in the dancing room. Whenever the local police enters the lights are switched on in the back room which is a signal to stop any unnatural acts. There is quite a few minors going there using false proof of

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age. These queers also ride up and down Austin Blvd. picking up young people and bringing them to the Magic Touch. The Motel in back of the Magic Touch does a pretty good business catering to these people to. We think the local police must know about what goes on in there. Why they have done nothing about it we do not know. The Magic Touch is busiest on Friday, Saturday and Wednesday nights. We have found out about this place by dressing like queers and going there ourselves. What we have written in this letter are things we have seen ourselves. We hope this matter will be investigated and alleviated. A place like the Magic Touch in this community will only lead to trouble. We thank you for your time and trouble.

Sincerely,

A Citizens Co."

As a result the licensees, Thomas and Anthony Cesiro were told to properly supervise the premises and an investigation revealed that on March 5 and June 4 of 1964 "queers" were seen at the Magic Touch.

Activity—Friday, June 26, 1964

Excerpts from Exhibit 26 show:

"On this date, Detective F. Abramowicz & W. Beach, assigned and present at the Magic Touch at 2315 hours. As writers attempted to enter the bar, they were stopped by a couple of male persons who stated that the premises were closed to the writers and a private was in progress. While

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writers were standing on the porch two negroes and one white male, apparently queer walked up to the door and each was charged three dollars and admitted. Writers then identified themselves as Police Officers, and walked into the bar and sealed off dance room which was crowded with an assortment of oddballs. At this point the manager was summoned and brought Detectices to his office. His name was John Vignini, 14 Striker Street Brooklyn, N.Y. He stated that the Magic Touch is owned by Anthony Cicero, 333 Lawrence Avenue, Oceanside, N.Y. He further stated that on the weekends three dollars is charged for each person entering the Tavern. The party is given two tickets entitling him to any drink in the house. On weekend all drinks are $1.25. He does this, he claims to keep out trouble makers from Long Beach. After the premises were inspected, with negative results, writers at 0300 left on another assignment. Persons interviewed also stated that the Magic Touch was always open to the authorities for any inspections which are deemed necessary."

Activity—Thursday, July, 1964

"Detectives Moriarty and Duhigg were assigned to this case. Detectives entered the premises at 2345 hours after being stopped at the door by John Vignini, mgr. and were told that they had a private party. Detectives identified themselves and entered with the mgr. "There were about seven people at the bar both male and female. The detectives then went into the back room where three tables containing two males each were sitting. Detectives

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then went back to the bar and started talking to a male about 40 years who said that he had been on the job in N.Y.C. and was practicing attorney. He said that he had worked for D.A. O'Connor's office in Queens. He showed an identification card with his picture and name Maurice Berkowitz, Investigator. He apparently was friendly with John Vignini, the mgr."

Activity—July 10, 1964

"On this date Dets. Gillings and Sheridan present at location said officers were met at the door by a person who later identified himself as John Vignini of 14 Striker Court Bklyn. who stated that he was the manager. Vignini attempted to stop the said officers and the officers were told that the the general public was not allowed in as it was a private party. Det. Gillings entered the rear room and found it crowded with black and white males dancing with one another and the lights turned up bright. Det. Gillings questioned the manager as to the reason why the lights are put on in the back room when a stranger enters, he denied any knowledge of this situation. When Det. Sheridan passed the bar he overheard a customer state that the lights are on in the back room. Det. Sheridan identified himself to this person who ran from the premises into a swamp and the officers looked for this individual with negative results. Vignini was warned to stop the carrying on at the premises and they left on another investigation. On July 12, 1964 Det. Gillings notified Mr. Bolsulm "of S.L.A. of the situation, who stated that if this office could

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prove that there was no private party he would take necessary action against the licensee. dlg."
Activity—Oct. 6, 1964

"On this date Captain Schuchman and Detective Moriarty interviewed the owner of the Flame, Atlantic Avenue, which had been set on fire the morning of October 5, 1964. Nat Warshaw of Felter Avenue, Hewlett, N.Y. stated that he was of the opinion that it had some connection with the Magic Touch as since they opened up three weeks previously they had taken most of their customers. He suspect the owner of the Touch Big Eddie of being behind the fire. J.M."

It is understandable that the owners of The Flame were suspicious. Not only had a fire destroyed another "restaurant" of theirs, they had been threatened with extortion followed by malicious mischief, a robbery and the burning of The Flame. Right after the fire, early in October, 1964, they told Dowling that DeCurtis had told them he owned the Magic Touch. They felt that since the Magic Touch gained from their loss, its owners were prime suspects.

They certainly had nothing to back up this suspicion. The wiretaps on their business and residence establishes this. They were so unreliable that eventually they were indicted for perjury because they told the Grand Jury that they couldn't remember telling Dowling DeCurtis told them he owned the Magic Touch.

Included in these findings are two appendices, (i) a list of exhibits, (ii) a chronology.

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CONCLUSION OF LAW

No evidence, direct or indirect, based upon eavesdropping or wiretaps can be introduced in Courts of this State since Section 813(c) of the Code of Criminal Procedure which authorizes eavesdropping and wiretaps has been declared unconstitutional as an unreasonable invasion of privacy in violation of the Fourth Amendment of the Constitution because it is a "broadside authorization" for a "general search" the use of which "was a motivating factor behind the Declaration of Independence." (*Berger* v. *New York*, 87 S.Ct. 1873, 1883; *Mapp* v. *Ohio*, 376 U.S. 643; *People* v. *Grossman*, 20 N.Y.2d 346; *People* v. *Cline*, 286 N.Y.S.2d 318.)

Even without *Berger*, no wiretap-based evidence would be admissible in this case because (1) an order prohibiting evidence directly or indirectly based upon wiretap was entered by County Judge Kelly based upon the People's affidavit in opposition to a motion to inspect the wiretaps that "no wiretap evidence will be used in this case," and (2) the People elected to exercise a public policy privilege (*People* v. *Keating*, 286 A.D. 150; 141 N.Y.S.2d 502; *Richardson on Evidence*, 9th Edition, Section 468) against divulgence of the location of the wiretaps thereby preventing a determination of whether a trespass was involved in the tapping of the defendants' phones and relegating the People to a position where wiretaps would not be permitted because of the possible trespass (*Silverman* v. *U.S.*, 365 U.S. 505).

However, where, as in this proceeding, the People establish that their evidence was obtained independently of

wiretaps, such evidence is admissible (*Nardone* v. *U.S.*, 308 U.S. 338). It is impossible at this stage to determine whether some witnesses might have been located through wiretaps. Accordingly, before accepting testimony of witnesses whose identity is not apparent on the face of the record, such as police officers, the People must come forward with proof that the witness was not indirectly the product of wiretaps, which proof the defense will be permitted to attempt to overcome (*People v. Malinsky, supra*).

The motion to suppress the evidence on the grounds that the defense has been deprived of a complete hearing in that it has been unable to call the informer who told Dowling about The Mask is also denied. Although defendants are entitled to the disclosure of information within the knowledge of the prosecution which will assist in presenting a defense, such disclosure is restricted where the public interest is better served by protecting the informer. Thus, "the necessities of effective law enforcement can prevent the defense from obtaining a pre-trial statement" (*People* v. *Rosario*, 9 N.Y.2d 286, 290).

Each case must be examined to determine which interest is entitled to prevail—individual or public. Here the public interest of protecting the informer outweighs the individual interest of *attempting* to locate a witness who, if he testifies truthfully, beyond a doubt will *confirm* the testimony of Dowling and hurt rather than help the defense (*People* v. *Malinsky; People* v. *White; People* v. *Swanberg*, all *supra; People* v. *Ray*, 26 A.D.2d 560).

Also denied is the motion to dismiss for lack of jurisdiction because the People did not comply with Section 270 of the Code of Criminal procedure which requires a Court Order before trying a charge that has been dismissed by the Grand Jury. The record shows that there has been

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no Grand Jury dismissal. Without such a dismissal, Grand Jury hearings do not affect jurisdiction in this Court of Special Sessions (*People* v. *Kelly,* 140 Misc. 377, 250 N.Y.S. 619).

Likewise the motion for a mistrial because the defendants, in attempting to prove that evidence was obtained through wiretaps, were obliged to introduce wiretap summaries containing gossip, hearsay and other prejudicial material inadmissible at a trial is denied (Section 14, Judiciary Law).

The motion to suppress is denied.

Dated at Mineola, New York

November 30, 1967

/s/ JOHN S. LOCKMAN
District Court Judge

APPENDIX F

Opinion of District Court of Nassau County on Motion to Suppress Defendants' Statements

DISTRICT COURT OF THE COUNTY OF NASSAU

STATE OF NEW YORK: FIRST DISTRICT

Index No. CR 1430
CR 1431
CR 1432

THE PEOPLE OF THE STATE OF NEW YORK

—against—

EDDIE DE CURTIS, JOHN VIGNINI, and DANIEL FATICO,

Defendants.

Mineola, New York
September 15, 1967

Before: HON. JOHN S. LOCKMAN,
District Court Judge

DECISION ON MOTION

APPEARANCES:

WILLIAM DILLON, ESQ.
Assistant District Attorney
For the People
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PHILIP VITELLO, ESQ.
Attorney for Defendant
225 Broadway
New York, New York

LEONARD FERRO, C.S.R.
District Court Reporter

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The Court: I make the following findings of fact:

1. A couple of days before June 7, 1967, a conference was held by members of the district attorney's squad at which Sergeant Tozzi was present, where he was given the names of the three defendants in this case.

The sergeant was instructed to conduct a raid on the Magic Touch Restaurant, at Island Park, Nassau County, New York. The date and time to be later supplied.

Ot approximately five past midnight on June 7, 1967, Sergeant——

Mr. Vitello: '65, your Honor.

The Court: Five past midnight——

Mr. Vitello: Of '65.

The Court: '65, thank you very much.

Officer Short and another officer went to the Magic Touch to ascertain how the warning system worked. Undercover men Taylor, Minett and Eberhardt were already at the premises.

Sergeant Tozzi at that time spoke with the Defendant Vignini, who is also called by the name Vincent, who I will refer to hereafter as Vincent, and at the time there were 150 to 200 people present in the premises.

There was a man at the front door and according to Officer Tozzi, Sergeant Tozzi, Vincent was the ticket taker. The intention of Sergeant Tozzi was to arrest Vincent, if necessary, for things taking place during the raid. He asked Vincent what his capacity was and Vincent said he was the manager and ticket taker of the premises.

Sergeant Tozzi also testified that he did not remember whether he had testified before the Grand Jury. He later said that his recollection was refreshed by conversations with Assistant District Attorney Levy and Assistant District Attorney Dillon and by certain activity sheets. He

testified that when Mr. Dillon spoke with him there was a sheet of paper which Mr. Dillon identified as the first page of the Grand Jury minutes, which Mr. Dillon did not read, but did have in his possession.

After Sergeant Tozzi left, he was on the premises about twenty-five minutes, he went back and spoke to the District Attorney and Assistant District Attorney Levy, and then a raiding party of 18 to 20 men, was made on the premises.

At the time Sergeant Tozzi arrived at five minutes after mdnight, Detective Minett was already on the premises, he saw the defendants Fatico and De Curtis.

Mr. Mulry: No, never testified that. No one did.

Mr. Vitello: It is testimony as of February 26, if I'm not mistaken.

The Court: You are absolutely right. I stand corrected. Thank you very much.

He testified that on February 26, he had seen defendants Fatico and De Curtis on the premises, defendant Fatico taking Eberhardt's money. Defendant De Curtis shouted "hey," to Eberhardt.

Mr. Mulry: There is no testimony to whom. He just said "hey." He didn't say to whom it was addressed. There is no testimony to that, sir, just "hey," that was all.

The Court: We will have to have that read back Monday, Mr. Mulry. My notes indicate——

Mr. Mulry: How can any one testify that he said "hey," to whom? He just said "hey."

The Court: We will have to go into that. At this time we will leave it the defendant De Curtis said "hey," and that the defendant John Vincent was at the bar and he came over and he said, John Vincent said, "It's all right, they are nice boys. They are quiet. They come here all the time."

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Then the defendant Fatico was taken to the district attorney's office where he was told—where he said, "I'm not any part of management. I give all the money to Mr. Vincent, the manager. Helping out a friend, Thomas Cicero."

A witness by the name of Fletcher testified he knows the defendant De Curtis and in the Fall of 1964, either September or October, he was employed at the Long Beach Motor Inn and the Magic Touch was on the right—room six, at the Long Beach Motor Inn.

The defendant De Curtis and others present when I—why he was asked by De Curtis why I passed out business cards to the Flame on Atlantic Avenue in Oceanside about two miles from the Magic Touch. He was further asked by the defendant De Curtis, "How come you discussed Magic Touch Rent? It's none of your business." To which Fletcher replied, "Business would be better with a different manager." The defendant De Curtis said, "As far as Johnny Vincent is concerned that's my business and I'll take care of it."

This witness testified that he had given the police a statement which was untrue in that he said he owned a business which he did not own. The witness was also unclear as to which statement refreshed his recollection, the handwritten one or a typed one, which had been given to Assistant District Attorney Levy.

These are my conclusions:

When Sergeant Tozzi arrived at five minutes after midnight on the 7th of June, 1965, at the premises of the Magic Touch with between 150 and 200 people present in the premises, the conversation that was held with the defendant Vincent was not held while the defendant Vincent was in custody or in control of the police.

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I therefore conclude that the statement that he was the manager and ticket taker of the premises is admissible for a jury to pass upon.

The second conclusion that I reach is that the shouting of "hey," by the defendant De Curtis and the statement by Vincent, "It's all right, they are nice boys. They are quiet. They come here all the time," were statements made when the defendants were not in custody and were voluntary statements. The statement, however, made by the defendant Fatico in the district attorney's office, "I'm not any part of management, I give all money to Mr. Vincent, the manager. I'm helping out a friend, Thomas Cicero," was a statement that was made in violation of the constitutional rights of the defendant Fatico and I rule it inadmissible.

The fourth conclusion:

Statements that were made in the Fall of 1964 described by Fletcher, why I, Fletcher, passed out business cards at the Flame on Atlantic Avenue in Oceanside about two miles from the Magic Touch. "How come you discussed Magic Touch rent? It's none of your business." And, "As far as Johnny Vincent is concerned, that's my business. I'll take care of it," were voluntary, not in violation of any constitutional right.

The People, of course, will be limited to these statements and can introduce no other statements.

This will be the order of the Court.

Mr. Vitello: Nothing to say now.

The Court: We will reconvene, then, gentlemen, at 9:30 Monday morning.

Thank you very much.

APPENDIX G

Opinion in Support of Verdict of Trial Court

DISTRICT COURT OF THE COUNTY OF NASSAU

FIRST DISTRICT: MINEOLA, N. Y.

Index Nos.: CR-1430/65
CR-1431/65
CR-1432/65

THE PEOPLE OF THE STATE OF NEW YORK

—against—

EDDIE DE CURTIS, JOHN VIGNINI and DANIEL FATICO,

Defendants.

Before: HON. JOHN S. LOCKMAN,
District Court Judge

DECISION AFTER TRIAL

APPEARANCES:

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By: WILLIAM DILLON, ESQ.

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Appendix G

Opinion in Support of Verdict of Trial Court

THE CHARGE

A four-count information charges that three defendants, acting in concert and aiding and abetting each other (1) conspired to violate Section 1146 of the Penal Law which prohibits disorderly houses; (2) maintained such a disorderly house; (3) received persons for purposes of lewdness in violation of Section 887 of the Code of Criminal Procedure (vagrancy), and (4) violated Section 899 of the Code of Criminal Procedure which prohibits the maintenance of a bawdy house and house for the resort of disorderly persons.

THE FACTS

After careful evaluation of the testimony of all witnesses, reconciliation of contradictions and inconsistencies, and based upon the appearance and demeanor of the witnesses, beyond a reasonable doubt, the trial record establishes the following:

Three undercover detectives, appropriately dressed, gained access to the premises in question, the Magic Touch, by convincing one of the defendants, Fatico, whose job as doorman was to keep strangers out, that they knew acquaintances of Fatico.

On each of their eight visits to the premises between November 13, 1964, and June 6, 1965, the detectives purchased tickets at the door which they exchanged at the bar for drinks. They then entered a large rear room where they observed a large number of both sexes with members of the same sex dancing, kissing, fondling the breasts and private parts, and placing the tongue inside the mouth of each other. Each of the defendants was observed present at some time while these lewd actions were occurring. Two of the defendants, Fatico and Vignini, also know as Vincent,

were observed on every visit to the premises. The other defendant, DeCurtis, was seen twice. The second time, on February 26, 1965, he watched the three detectives purchase their tickets from the doorman Fatico and as they entered DeCurtis called, "Hey." Vignini then went to DeCurtis and explained that it was all right, these were nice boys who had been there before.

Prior to this, in the fall of 1964, DeCurtis had asked a witness, Fletcher, why he was discussing the rent of the Magic Touch and promoting one of its competitors. When Fletcher answered that he had been offered a job by the competitor, DeCurtis asked why he hadn't asked him, DeCurtis, for a job. Fletcher volunteered that Magic Touch business would be better with a different manager. DeCurtis responded that, "as far as Johnny Vincent is concerned, I'll take care of it."

For approximately one year prior to April, 1965, Fletcher had visited the Magic Touch. He had seen Vignini there and on three occasions Fatico and DeCurtis, including once when the premises were closed and DeCurtis was present.

On their first visit, November 13, 1964, the detectives noticed that when they entered the rear room the bright lights went on, shuffling was heard and dancing resumed only when the lights were dimmed. On their third visit on January 8, 1965, while the detectives were in the rear room the bright lights went on and the dancers exchanged partners and discontinued their lewd actions so that females were dancing with males in an orderly manner. When the lights were dimmed they returned to their former partners of the same sex and resumed their lewd activities.

On their final visit, on June 6, 1965, while in the rear room the detectives again observed the bright lights go on, the exchange of partners, and saw three uniformed police officers inspecting the premises. It was during this inspec-

tion that Vignini identified himself as the manager and ticket taker. After the police left the lights were dimmed and Vignini said, "It's all right, they are gone; continue on and have fun."

THE LAW

At the conclusion of the People's case, the defense requested the identity of an informer whose information led the police to the Mask, a public bar where they learned the names used to gain admittance to the Magic Touch. This identity was requested so that the informer could be subpoenaed as a defense witness.

This request is denied. Where information is subsequently confirmed, as in this case, the informer need not be identified even though his prior reliability was not established (*People* v. *Coffey,* 12 N.Y.2d 443; 240 N.Y.S.2d 721; *People* v. *Santiago,* 13 N.Y.2d 326; 247 N.Y.S.2d 473; *People* v. *Malinsky,* 15 N.Y.2d 86; *People* v. *White,* 16 N.Y. 2d 648; *People* v. *Ray,* 26 App. Div. 2d 560).

The defense moved to dismiss the information on three grounds:

(1) The information was jurisdictionally defective since it was drawn in the conjunctive charging the defendants with keeping a house of ill-fame *and* assignation *and* lewdness *and* other indecent *and* disorderly *and* obscene purposes.

(2) There was a merger of the conspiracy charge with that of keeping a disorderly house which also merged with the vagrancy count.

(3) The People failed to prove the defendants' guilt beyond a reasonable doubt.

The first two grounds have no merit. (1) *People* v. *Harrison,* 40 M.2d 601; 243 N.Y.S.2d 432; *People* v. *Pat-*

rick, 175 M. 997; 26 N.Y.S.2d 183; *People ex rel. Krohn* v. *Thomas*, 133 M. 145; 231 N.Y.S. 271; *Peaple Haverty*, 21 M.2d 198; 191 N.Y.S.2d 34. (2) *People* v. *Erickson*, 171 M. 937; 13 N.Y.S.2d 997. Reversed on other grounds, 283 N.Y. 210, reargument denied, 283 N.Y. 774; *People ex rel. Sivers* v. *McGee*, 166 M. 379; 2 N.Y.S.2d 500; *People ex rel. Thornton* v. *Becker*, 188 M. 181; 66 N.Y.S.2d 804; *People* v. *Tavormina*, 257 N.Y. 84.

The third ground requires analysis of the individual counts.

I. CONSPIRACY

Conspiracy requires (a) an agreement (b) to knowingly and intentionally (c) commit a crime or act injurious to public morals and (d) some overt act in furtherance of the agreement.

A conspirator need not be a party to the original agreement provided he subsequently knowingly confirms the agreement. The agreement can be inferred from behavior. Such an inference may certainly be drawn from the fact that the defendant knowingly permitted homosexuals and lesbians to gather for lewd purposes. This inference is reinforced by the defendants' efforts to conceal the activities at the Magic Touch by restricting attendance to known patrons and by the installation of a warning system.

However, inferences consistent with innocence can also be drawn. The defendants may have planned to cater to homosexuals without any plan that the homosexuals behave lewdly. Or, the defendants may have become associated with the operation after it was in full fruition. They may have participated without any agreement.

It is fundamental that inferences consistent with innocence must be adopted. Accordingly, the motion to dismiss the conspiracy is granted.

Appendix G

Opinion in Support of Verdict of Trial Court

II. KEEPIG A DISORDERLY HOUSE

Section 1146 of the Penal Law prohibits "a house of ill fame or assignation of any description or a *place for the encouragement or practice by persons of lewdness,* fornication, unlawful sexual intercourse *or for any other indecent or disorderly act or obscene purpose there . . .*" (Empahsis added.)

The course of conduct at the Magic Touch knowingly permitted by the defendants violated this clear language. Motion denied.

III. VAGRANCY

"Section 887, C.C.P. Who are vagrants

"The following persons are vagrants. . . .

"4. A person . . . . (e) who receives or offers or agrees to receive any person into any place, structure, house, building or conveyance for the purpose of prostitution, lewdness or assignation or knowingly permits any person to remain there for such purposes. . . ."

Since the defendants knowingly permitted persons to remain at the Magic Touch for purposes of lewdness this motion is denied.

IV. DISORDERLY PERSONS

"Section 899. Who are disorderly persons

"The following are disorderly persons:

"1. Persons who actually abandon their wives or children, without adequate support, or leave them in danger of becoming a burden upon the public, or who neglect to provide for them according to their means;

"2. Persons who threaten to run away, and leave their wives or children a burden upon the public;

Appendix G

Opinion in Support of Verdict of Trial Court

"3. Person pretending to tell fortune, or where lost or stolen goods may be found; but this subdivision shall not be construed to interfere with the belief, practices or usages of an incorporated ecclesiastical governing body or the duly licensed teachers or ministers thereof acting in good faith and without personal fee, nor shall it be construed to prohibit or prevent any show, trick, feat, display, or other act or exhibition, performed by a magician or mentalist for purposes of amusement or entertainment and without personal fee;

"4. Keepers of bawdy houses or houses for the resort of prostitutes, drunkards, tipplers, gamesters, habitual criminals, or other disorderly persons;

"5. Persons who have no visible profession or calling, by which to maintain themselves, but who do so, for the most part, by gaming;

"6. Common showmen and mountebanks, who exhibit or perform for profit idle shows, acts or feats;

"7. Persons who keep, in a public highway or place, an apparttus or device for the purpose of gaming, or who go about exhibiting tricks or gaming therewith in a public highway or place;

"8. Persons who play, in a public highway or place, with cards, dice—or any other apparatus or device for gaming;

"9. Habitual oriminals within the provisions of this code."

This statute is penal and must be strictly construed (*People* v. *Butler,* 18 M.2d 904; 187 Y.S.2d 877).

The only enumerated subdivision applicable to this action is (4) and within this subdivision the only categories

applicable are "bawdy houses" and "other disorderly persons."

A bawdy house is a house operated by a bawd. *Webster's International Dictionary, Third Edition,* defines a bawd as, "1. Go-between, pander. 2. (a): one who keeps a house of prostitution; madam; (b): prostitute," and a bawdy house as a brothel. This definition is confirmed by *Black's Law Dictionary,* and *Words & Phrases.* The Magic Touch does not come within this definition.

"Other disorderly persons" whom strictly construed under a statute commencing, "Who are disorderly persons. The following are disorderly persons:" must mean disorderly persons as defined under that statute.

Section 238, Statutes, provides, ". . . Where words of specific or inevitable purport are followed by words of general import the application of the last phrase is generally confined to the subject matter disclosed in the phrases with which it is connected. . ." This is a codification of the common law doctrine of *noscitur a sociis* (it is known from its associates) and *ejusdem generis* (of the same kind). Under these rules of construction the defendants were not disorderly persons and the motion to dismiss this count is granted.

The defendants are found guilty on counts II and III and are directed to appear at the Criminal Part Clerk's office not later than 2:00 P.M. on or before February 2, 1968, for processing by the Probation Department preliminary to sentencing on February 29, 1968.

Dated at Mineola, N.Y.
January 29, 1968

/s/ JOHN S. LOCKMAN
District Court Judge

APPENDIX H

Order and Opinion of Supreme Court, Nassau County, on Motion for Certificate of Reasonable Doubt

MEMORANDUM BY PITTONI, J.

SUPREME COURT, NASSAU COUNTY

SPECIAL TERM, PART I

(Cal. 36—3/19/68)

Ind. #1430/65
#1431/65
#1432/65

Dated March 20, 1968

In the Matter of the Application for a Stay of the Execution of the Judgment Rendered in the Action entitled

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents,

—against—

EDDIE DE CURTIS, JOHN VIGNINI and DANIEL FATICO,
Appellants.

HON. WILLIAM CAHN
District Attorney
Nassau County
Mineola, New York 11501

PHILIP VITELLO, ESQ.
Attorney for Defendants, Vignini and Fatico
225 Broadway
New York, N. Y. 10007

GEORGE E. MULRY, ESQ.
Attorney for Defendant De Curtis
1551 Franklin Ave.
Mineola, New York 11501

Appendix H

Order and Opinion of Supreme Court, Nassau County, on Motion for Certificate of Reasonable Doubt

Defendants application for a certificate of reasonable doubt and for an order admitting defendants to bail pending the determinations of their appeals to the Appellate Term is *granted.*

This case was treid before a judge, without a jury, in what the District Attorney states was the longest trial in the history of the District Court. The same judge had previously heard eight weeks of testimony on the question of whether evidence derived from interception of telephonic communications was used in the case.

At the outset, it must be stated that the judge who heaard and decided the preliminary hearing and the case at the subsequent trial has the reputation for being one of the fairest judges and the record before me fails to overcome that reputation.

Defendants have raised eleven issues to sustain their application for a certificate of reasonable doubt. It is unnecessary, for the purpose of this decision, to repeat them.

However, the record does show that certain wire-tap tapes were destroyed by the investigators soon after they were made and that all that was produced at the hearing were summaries of those tapes prepared by the investigators from the now unavailable tapes. The destruction of the tapes, innocent or otherwise, made it difficult to tell whether the subsequent investigations were in any way assisted by leads obtained from the destroyed tapes (See *People* v. *Betts*, 272 App. Div. 737, *aff'd.* 297 N.Y. 1,000).

Another troublesome question is the destruction of thirty photographs of certain premises by investigators who took them but who felt they were not true portrayals of the scenes involved. The question arises as to whether they

Appendix H

Order and Opinion of Supreme Court, Nassau County, on Motion for Certificate of Reasonable Doubt

would have incriminated or helped to exculpate the defendants.

Certainly, as the judge who tried the case stated, the People were required to produce for examination by the defense all statements, etc. which would refresh the witness' recollection or were of exculpatory nature or would tend to establish that any evidence was obtained in violation of the constitutional rights of the defendants. That being so, did the destruction of the wire-tap tapes and of the thirty photographs prevent such production? Such destruction may give rise to the inference that the matter destroyed was unfavorable to the destroyer (*People* v. *Betts*, 272 App. Div. 737, aff'd. 297 N.Y. 1,000; Richardson on Evidence, 9th Ed., Section 91).

Another troublesome question is the refusal and approval of the refusal to divulge names of informers (*Roviaro* v. *United States*, 353 U.S. 53; of. *Ruqendorf* v. *United States*, 376 U.S. 528).

Enough has been shown to warrant the granting of a certificate of reasonable doubt. It must be understood, however, that the points discussed are merely held to be arguable issues and do not reflect my opinion as to their actual worth or merits after the matters have been fully discussed and fully considered. In the meantime, defendants should not have to languish in jail while technical questions of law are being briefed and thereafter studied by an appellate court with some reasonable possibility that the convictions may be reversed.

Submit an order together with the certificate of reasonable doubt and leave the spaces for the amounts of bail blank so that the amounts of bail can be inserted after conference with the District Attorney.

.....

J. S. C.

APPENDIX I

Order of the New York Court of Appeals Granting Temporary Stay and Continuing Bail

STATE OF NEW YORK—COURT OF APPEALS

Before: HON. FRANCIS BERGAN,
Associate Judge

EDDIE DE CURTIS, JOHN VIGNINI, and
DANIEL FATICO,

Petitioners,

—v.—

PEOPLE OF THE STATE OF NEW YORK

Respondents.

The petitioners, each having heretofore been convicted in the District Court of Nassau County of the crimes of Keeping a Disorderly House (New York Penal Law Section 1146, repealed L. 1965, ch. 1030) and Vagrancy (New York Code of Criminal Procedure Section 880[4], repealed L. 1967, ch. 681), and their convictions having been affirmed by order of the Appellate Term of the Supreme Court of the State of New York, Second Judicial Department, and this Court, having affirmed said order of affirmance by its remittitur, dated July 7, 1971, and the petitioners having been free on bail during the pendency of the aforesaid proceedings; and

The petitioners having moved before me on July 27, 1971, for an order staying their commitment under the judgment of conviction herein, and continuing them on bail, pending the filing and determination of a petition for certiorari in the Supreme Court of the United States, wherein they intend to raise the following Federal Constitutional issues which were argued by them and decided adversely to them in this Court:

Appendix I

Order of the New York Court of Appeals Granting Temporary Stay and Continuing Bail

I. Where it is held that all evidence obtained by means of wiretapping must be excluded, the prosecution may not set up as an independent source of evidence an informer whose identity it refuses to disclose. Such a refusal violates the defendants' rights to a fair hearing, confrontation, cross-examination and representation by counsel, all as guaranteed through the Fourteenth Amendment of the Federal Constitution.

II. Within the context of a gathering which is not open to the public and which is not attended by minors, it is a violation of the rights to assembly and equal protection, guaranteed by the Federal Constitution, for a host to be prosecuted simply because his patrons, of the same sex, dance, kiss and touch each other's clothed bodies.

III. Within the context of the within prosecution, the defendants were subjected to a violation of basic standards of fairness and due process in that they could not reasonably have forseen that they were exposing themselves to penal liability in permitting their patrons to conduct themselves in the manner described.

IV. The prosecution's pattern of spoilation and concealment of evidence deprived the defendants of a fair trial and mandated a dismissal of the informations, by virtue of the due process clause of the Fourteenth Amendment of the Federal Constitution.

Appendix I

Order of the New York Court of Appeals Granting Temporary Stay and Continuing Bail

Now, having heard Henry J. Boitel, attorney for the petitioners, in support of said motion, Henry P. De Vine, Assistant District Attorney of Nassau County, in opposition thereto, it is hereby

ORDERED that the commitment of the petitioners be stayed, and that the bail heretofore fixed as to each of them be continued, pending the making and determination of a motion for similar relief before a Justice of the Supreme Court of the United States, pursuant to Rule 27 of the Rules of the Supreme Court of the United States, provided, however, that said motion be filed with the Clerk of the Supreme Court of the United States on or before August 12, 1971: If said motion shall not have been filed on or before the date specified, the stay hereby ordered shall terminate on that date.

Enter

/s/ HON. FRANCIS BERGAN
Associate Judge
Court of Appeals of the
State of New York

Dated: Albany, New York
August 2, 1971

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-345

EDDIE DE CURTIS, JOHN VIGNINI and DANIEL FATICO,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

WILLIAM CAHN
District Attorney, Nassau County
Attorney for Respondent
County Court House
Mineola, N. Y.

HENRY P. DEVINE
Assistant District Attorney
of Counsel

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IN THE

Supreme Court of the United States

October Term, 1971

No.

EDDIE DE CURTIS, JOHN VIGNINI and DANIEL FATICO,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Eddie De Curtis, John Vignini and Daniel Fatico, pray that a writ of certiorari shall issue to review a judgment of the New York State Court of Appeals entered on July 7, 1971.

Opinions Below

Before the trial commenced, the petitioners made a motion in the Nassau County Court for an order suppressing wiretap evidence and by memorandum dated July 19, 1966, the motion was granted (Appendix A).

At a hearing during the trial, an opinion was issued that the District Attorney had satisfactorily established

that none of the evidence to be offered at the trial resulted from wiretap evidence (Appendix B).

A second opinion was rendered by the trial judge on the same proposition (Appendix C).

At the conclusion of the trial, a third opinion was released by the trial judge finding petitioners guilty (Appendix D).

The Appellate Term, Second Judicial Department of the Supreme Court of the State of New York affirmed the petitioners' convictions in an opinion which is officially reported at 63 Misc. 2d 246 (Appendix E). There are no opinions in the Court of Appeals of the State of New York.

Jurisdiction

The jurisdiction of this Court is apparently sought pursuant to 28 U.S.C. § 1257, subd. 3, and Rule 19, subd. 1, of the rules of this Court.

Questions Presented

Petitioners were convicted following a non-jury trial in the District Court for the County of Nassau of being a Disorderly Person in violation of § 1146 of the old Penal Law and Vagrancy as outlawed by § 887, subd. 4 of the old Code of Criminal Procedure.[1]

The uncontroverted evidence proved petitioners ran a bar in Nassau County by name "Magic Touch" catering to the "Gay People". First, because a competitor's

[1] A brand new Penal Law was enacted to become effective September 1, 1967, and a new Code of Criminal Procedure was enacted to become effective September 1, 1971. Section 887, subd. 4 was dropped and § 1146 was substantially changed, being re-enacted in part, as § 230.25 and § 230.40.

premises "The Flame" was burned under circumstances amounting to arson and, secondly, because of a robbery and, third, because of malicious mischief that occurred at "The Flame", and also because of the associates of petitioners generally and De Curtis, in particular, the Rackets Squad of the District Attorney's Office in Nassau County suspected certain elements of organized crime were now catering to the needs of the "Gay People" in metropolitan New York by setting aside particular bars where they could express themselves at a slight cost but a great expense (mugging, robbery, stealing, etc.).

In connection with the investigation, wiretaps were procured on "The Flame" and the "Magic Touch" in Nassau County and the "Mask", a New York City bar also catering to the "Gay People".

The wiretapping was resorted to not because appellants were vagrants and disorderly persons but because of the arson, robbery, malicious mischief, and other circumstances tending to suggest an underworld war amongst other things.

Before the trial commenced, the judge ruled there could be no wiretap evidence used and admittedly no wiretap evidence was introduced against petitioners.

Their convictions rested on the eyewitness testimony of police undercover agents who entered the premises and testified to their observations.

In the state courts petitioners contended the judgments of conviction should be reversed because guilt was not established beyond a reasonable doubt. Nowhere did the petitioners argue a constitutional question.

Now, for the first time, they contend certiorari should be granted because the statutes on their face are so vague and uncertain as to violate the Fourteenth Amendment. It is settled law petitioner may not raise a federal constitutional argument for the first time in a petition for certiorari.

Petitioners contend also for the first time §§ 1146 and 887 as applied to them by New York wrongfully interferes with their First Amendment right to peaceably assemble. The argument is invalid because petitioners did not timely object in the state courts on these constitutional grounds.

Moreover, the First Amendment does not guarantee a liquor licensee in New York the authority to promote indecent shows behind locked doors in a public premises set aside for the public for the service and sale of liquors, etc.

In any event, § 887 was repealed September 1, 1967, more than 4 years ago. Section 1146 of the old Penal Law was dropped effective September 1, 1971, when a new Penal Law went into effect in New York. Under the circumstances, the arguments addressed to the face of the statute would appear to be moot.

The Evidence

The 6100 page record reveals that the District Attorney received complaints about the "Magic Touch", a restaurant at Island Park, in the County of Nassau. It was charged that the Magic Touch catered to homosexuals so an investigation was commenced. Three Nassau County Police Department detectives, Eberhardt, Taylor and Minett, were assigned to get into the premises and find out if the complaints had any substance.

On November 13, 1964, the three Detectives arrived at the Magic Touch, but Taylor's attempt to enter proved unsuccessful (T.M. 8; 100; 384-387; 989-991). After a brief discussion among the Detectives, Eberhardt and Minett were permitted to enter after Eberhardt told Fatico, at the door, that he, Eberhardt, knew "B.J." and "Jiggs" (T.M. 1233). Eberhardt paid Fatico a $3.00 fee at the door and received tickets which he turned in for drinks.

The "Magic Touch" was divided into two areas, a front bar and a rear room directly behind the bar (T.M. 18, 1211-1228).

As Eberhardt and Minett entered the rear room, bright lights went on for about a minute which blinded the officers temporarily and a lot of shuffling of feet and chairs moving took place (T.M. 18-19; 1234). The two officers sought a place to sit but due to the crowd of people present, they stood against a wall. Eberhardt saw boys dancing with other boys and girls dancing with other girls. The boys while dancing were kissing each other, and one of the boys was rubbing the other boy's crotch (T.M. 18-21). The girls dancing and kissing each other and one girl would rub the breasts of the other girl and insert a hand into the crotch of the other girl (T.M. 18-22; 48-117).

Eberhardt, Taylor and Minett repeated their visits to the Magic Touch some eight to ten times between November, 1964 and June, 1965 (T. 39, 1108). The same kind of activity by the patrons was observed on all these visits by the police (T.M. 18-22; 48-117).

On one visit (June 6, 1965) among other things they saw one boy hugging another boy and inserting his tongue in the latter's navel while hugging the latter's buttocks (T.M. 97; 1009-1010; 1238-1243).

During the June 6, 1965 visit uniformed police visited the Magic Touch while Eberhardt and the other undercover agents were in the back room (T.M. 110; 1282-1286). The patrons, boys dancing with boys, girls dancing with girls, quickly switched partners when the lights went on so that boys and girls would be dancing together by the time the police entered the back room (T.M. 100; 249-250; 1007-1011; 1255-1256).

On all of the visits the three detectives found defendants, Eatico and Vignini, present collecting money and issuing tickets at the door, admitting the patrons.

De Curtis was observed twice on the premises (January 8, 1965 and February 26, 1965). He questioned the entry of the detectives until Vignini advised De Curtis, "That's all right. They are nice quiet fellows. They come here quite frequently. . . . All right boys, come on." (T.M. 51-55; 73-76, 84-88; 996-1003; 1250-1262).

During the visit of November 20, 1964, Detective Eberhardt took some snapshots of the activities at the Magic Touch (T.M. 34).

However, the films upon development turned out to be blank and were thrown away by Detective-Sergeant Tozzi (T.M. 138-142; 229-244; 419-425; 511; 515; 519; 523; 525; 1037).

Robert Fletcher, a civilian witness, residing at Mechanicsburg, Pennsylvania, testified that he visited the Magic Touch from April, 1964 to April, 1965 while he was employed at the Long Beach Hotel, next door (T.M. 689-692). He knew all the defendants, having seen them at the Magic Touch at various times (T.M. 693). In the Fall of 1964, he met with De Curtis in Room 6 of the Long Beach Motel (T.M. 694). De Curtis made inquiry of Fletcher's passing out cards promoting "The Flame", the competitor of the Magic Touch, and when Fletcher told him of an offer of a job, De Curtis inquired, "How come you didn't come and ask me for a job?" De Curtis also told him that he would take care of Johnny Vincent's (Vignini's) manner of managing the Magic Touch (T.M. 698-702; 731; 741-748).

Detective Donald Sondergaard testified he investigated the fire at the Flame on October 5, 1964, and interviewed Fletcher on November 24, 1964, during which he learned of the meeting with Fletcher and De Curtis (T.M. 955-960). The detective apparently learned of the "Mask" (De Curtis' other bar) from a wiretap although he already knew of the existence of "Jiggs" prior to that (T.M. 983-985). He and Eberhardt visited the Mask and saw "Jiggs" and "B.J." there (T.M. 985). The Flame opened on Labor

Day, 1964, and was closed by the fire in October 1964 (T.M. 988).

The substance of the testimony given by Detectives Taylor (T.M. 988-1155) and Minett (T.M. 1210-1392) was presented above as part of Eberhardt's.

During Detective Eberhardt's testimony, the trial was interrupted by a protracted hearing (4,627 pages) concerning certain wiretaps and alleged leads obtained therefrom, The lower court denied the motion to suppress the wiretaps in the annexed decision.

It is undisputed that all three detectives found Fatico and Vignini taking part in the management and running of the premises. According to each detective, Fatico and Vignini were present collecting money, issuing tickets at the door, and admitting patrons. De Curtis was observed at least twice on the premises (January 8, 1965 and February 26, 1965). His role and involvement was clearly established when he challenged the entry of the detectives until Vignini reassured him: "That's all right. They are nice quiet fellows. They come here quite frequently. . . . All right, boys, come on" (51-55; 73-76; 84-88; 996-1003; 1250-1262).

The civilian witness, Robert Fletcher, corroborates the detectives particularly with regard to De Curtis who Fletcher says challenged him because he was passing out cards promoting the "Flame", a competitor of the "Magic Touch." According to Fletcher, he advised De Curtis that he had a job offer whereupon De Curtis replied. "How come you didn't come and ask me for a job?". De Curtis reassured him that he would take care of Vignini, who was then managing the Magic Touch (698-702; 731; 741-748).

Without a massive repetition of the eyewitness' testimony of Detectives Eberhardt, Taylor and Minetti concerning their observations of the homosexual activities at the

Magic Touch on eight separate dates between November 1964 and June 1965, it is clear that the defendants were Keeping a Disorderly House (former Penal Law, § 1146) and were guilty of Vagrancy within the meaning and spirit of § 887-(4)(e) of the Code of Criminal Procedure.

Section 1146 of the former Penal Law is of sufficient magnitude to cover the activities herein. The fact that the conduct also violated § 106(6) of the Alcoholic Beverage Control Law is of no moment.

There is no question that De Curtis, Vignini and Fatico ran the Magic Touch and that the Magic Touch was a "disorderly house" in the sense that "lewdness" . . . "or any other indecent . . . or obscene purpose" was "encouraged", "or practiced by persons of lewdness," (Penal Law 1146). As the Court declared in *Becker* v. *New York State Liquor Authority* (21 N.Y. 2d 289 [1967] at page 292:

> "Nevertheless, a line must be drawn somewhere between which sexual acts are to be permitted in public places and which are not. In our view, the line must be drawn at public feeling of private parts. In this regard, we would not distinguish between the activities of homosexuals and that of heterosexuals. *Fondling of the primary sexual organs in licensed premises on a public dance floor clearly constitutes a disorder whether between heterosexuals or homosexuals* under subdivision 6 of Section 106 of the ABC Law." (Emphasis added.)

It is clear that the conduct herein, i.e., the fondling of the primary sexual organs on a dance floor in a bar whether by heterosexuals or homosexuals cannot be condoned and does violate § 1146 of the former Penal Law. It can reasonably be described as conduct by persons of lewdness, practicing indecent or disorderly acts for obscene purposes. Clearly, the conduct of the patrons not only permitted but also encouraged by the defendants who were present on the premises, violated the true meaning and spirit of the stat-

ute as the lower court determined. The conduct herein was proscribed by the statute.

Former § 887(4)(e) of the Code of Criminal Procedure (Vagrancy) provides.

> "The following persons are vagrants:
>
> 4. A person . . . . (e) who receives or offers or agrees to receive any person into any place, structure, house, building or conveyance for the purpose of prostitution, lewdness or assignation or knowingly permits any person to remain there for such purposes; . . ."

The trial court properly concluded that the defendants herein knowingly permitted persons to remain at the Magic Touch for purposes of lewdness.

Although subdivision 4 of § 887 of the Code of Criminal Procedure has been described as a general prostitution statute which "condemns various aspects and incidents of pandering and prostitution" (*People* v. *Gould,* 306 N.Y. 352, p. 354; *People* v. *Moss,* 309 N.Y. 429), the Court has never held that subdivision 4 does not condemn *other conduct encompassed within* its express language (e.g., *People* v. *Hale,* 8 N.Y. 2d 162, p. 164) (emphasis added).

In *Hale, supra,* the Court held the statute applied to loitering homosexuals.

It is apparent, therefore, that clause (e) of subdivision 4 (Code Crim. Pro. 887) is sufficiently broad to encompass the lewd conduct by the homosexuals at the Magic Touch as well as conduct by prostitutes. The statute is not artificially construed but, in fact, the spirit and purpose of the statute is realistically applied.

The Writ Should Be Disallowed

There are no compelling reasons for granting the writ because the New York State Court of Appeals did not decide a Federal constitutional question. In the Court of Appeals, the brief filed for each petitioner reveals the following (3-4):

"QUESTIONS PRESENTED

1. Where it appears that evidence necessary to sustain a prosecution derived from wiretapping, and where it is held that evidence so obtained may not be used at trial, must the Prosecutor identify an informer upon whom the prosecution depends as an independent, untainted source of the evidence in question?

2. Where the proof established that the management of a club, not open to the general public, has permitted some of its customers to engage in conduct such as the consensual touching of clothed genital areas, does such permissiveness fail to constitute a violation of Penal Law Section 1146 and Code of Criminal Procedure Section 887?

3. Where certain of the defendants are not shown to be a part of active management, must they be found not guilty for such permissiveness as is described in Question 2?

4. Upon the facts of this case, did the prosecution's pattern of spoilation and concealment of evidence deprive the defendants of a fair trial and mandate the dismissal of the Information?"

It is apparent that the issues raised had to do with the practice in the State courts of New York including the sufficiency of the evidence, petitioners' guilt, and whether it was established beyond a reasonable doubt.

The references to wiretapping then and now are nothing more than a smoke screen. The trial judge ruled at the outset that he would not permit any wiretap evidence and admittedly wiretap evidence was not employed in the trial of this very simple case. Moreover, a separate and independent hearing running in excess of 4,100 pages of the record was devoted to proving the eyewitness testimony of the police undercover agents was in no way the result of the wiretaps.

During the hearing, an Assistant District Attorney testified that an informant had told him about the goings on at the "Mask" and the code to be employed to gain entrance. It was and is claimed the trial judge committed error of constitutional proportions when he refused to order the District Attorney to identify his informant. We disagree.

Regarding the duty to disclose, the Court declared: "There is no hard and fast rule. * * * 'The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense and the answer 'must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.'" (*People* v. *Coffey* [1963] 12 N.Y. 2d 443, p. 453).

The Court in *Coffey* then laid down the rule that blocks the objection by appellant: "When, as here, the person whose name is held back is a mere transmitter of information and not in any sense a competent witness as to the crime itself and when there is, as there is here, strong and dependable proof of the accuracy of his information, 'proper balance' makes non-disclosure apprqpriate" (*supra,* p. 453).

In fact, the dissenter in *Coffey* acknowledged that "Where the informer's information does no more than

trigger or initiate the investigation and such investigation uncovers sufficient evidence, separate and apart from the informer's communication, to establish probable cause for the arrest and search, the informer's identity need not be divulged'' (*supra,* p. 454).

Finally, where the existence of the informer is verified, as here, "by an independent witness * * * such as the district attorney'' (*People* v. *Malinsky* [1963] 15 N.Y. 2d 86, p. 93), disclosure is unnecessary.

Tested by the foregoing, what do we have. First of all, Dowling, an Assistant District Attorney, testified without contradiction to the existence of the informer and the fact that the informer tipped him six days before the wiretap about the ''Mask'' and the existence of ''Jiggs'' and ''B.J.'' etc. The trial judge's findings regarding Dowling were very specific. Judge Lockman found: ''It is that of an honorable man. It is believed'' (A. 14).

Additional reasons are apparent proving the trial judge's ruling lawful. First, the informer was a ''mere transmitter of information''; secondly, there was ''strong and dependable proof of the accuracy of the information'' in the reports of Detectives Eberhardt, Minett and Taylor rendering disclosure unnecessary. Third, the informer's role in this case did no more than ''trigger or initiate the investigation'' which resulted in clear and convincing evidence of appellants' guilt. We respectfully submit the evidence meets not one, but every test for concealment adopted by New York.

New York's rule having to do with the informant does not run afoul of any prior decision of this Court.

It is settled that petitioner must raise a substantial Federal question in the State Courts initially before this Court will entertain the case (*Cardinale* v. *Louisiana,* 394 U.S. 437; Stern, Supreme Court Practice, 4th Ed., §§ 3.25-3.35, pp. 116-146).

Not having specifically challenged the constitutionality of § 1146 or § 887, subd. 4 in the trial court, Appellate Term or Court of Appeals, it is must too late to do so initially at this time.

Moreover, the issues raised are really moot because the statutes were not re-enacted and are no longer on the books in New York. In fact, § 887 was repealed by Chapter 681 of the Laws of 1967, New York, effective September 1, 1967.

This Court is now being asked to pass upon the constitutionality of a statute that has been off the books for over 4 years. Substantially, the same criticism can be raised with regard to § 1146. It was not re-enacted as part of the new Penal Law effective September 1, 1971. There is no precedent for this Court to grant certiorari and rule on the constitutionality of non-existing statutes under circumstances such as these.

CONCLUSION

The petition should not be granted or, in the alternative, should be shelved.

Respectfully submitted,

WILLIAM CAHN
District Attorney, Nassau County
Attorney for Respondent

HENRY P. DEVINE
Assistant District Attorney
of Counsel

APPENDIX A

(Opinion of County Court of Nassau County on Motion to Inspect Wiretap Orders)

COUNTY COURT—NASSAU COUNTY

SPECIAL TERM: PART I

Motion Cal. #C-507

Present: HON. PAUL KELLY,
County Judge.

———o———

PEOPLE OF THE STATE OF NEW YORK,

against

EDDIE DE CURTIS, a/k/a EDDIE TOY,
Defendant.

———o———

HON. WILLIAM CAHN
District Attorney
Nassau County
Mineola, New York

GEORGE E. MULRY, ESQ.
Attorney for Defendant
1551 Franklin Ave.
Mineola, N. Y.

This is an application by defendant for an Order authorizing the inspection of any ex parte "wiretap order" as may have been issued by this Court and through which evidence was obtained against defendant, and to suppress

any evidence secured against this defendant as the result of the execution thereof.

In opposition to this motion the District Attorney has stipulated "'. . . that no wiretap evidence will be offered in this case".

Upon the affidavit and stipulation of the District Attorney that evidence will not be offered against this defendant which had been secured by virtue of a wiretap order, it is

ORDERED, that the motion of defendant Eddie De Curtis to inspect any ex parte wiretap order issued by this Court, is denied, and it is further

ORDERED, that upon the stipulation of the District Attorney, the District Attorney is precluded from offering upon the trial of this defendant any evidence that may have been directly or indirectly obtained as the product of the execution of any ex parte wiretap order.

Enter

Dated: July 19, 1966

PAUL KELLY
C.J.

APPENDIX B

(Opinion of District Court of Nassau County as to Burden of Proof)

DISTRICT COURT OF THE COUNTY OF NASSAU

First District: Mineola, N. Y.

Index No. CR-1430/65
CR-1431/65
CR-1432/65

—o—

The People of the State of New York,

against

Eddie De Curtis, John Vignini and Daniel Fatico,

Defendants.

—o—

Before: Hon. John S. Lockman,
District Court Judge.

Appearances:

William Cahn, Esq., District Attorney, Nassau County, Mineola, N. Y., by William Dillon, Esq.

George Mulry, Esq., Attorney for Defendant De Curtis, 1551 Franklin Avenue, Mineola, N. Y.

Philip Vitello, Esq., Attorney for Defendants Fatico and Vignini, 50 Court Street, Brooklyn, N. Y.

Appendix B

The Court: The threshold problem which the Court has been asked to render a decision on is who has the burden of proof where wire tap evidence exists and may have furnished leads to the evidence in the case. Prior to the United States Supreme Court decision in *Mapp* v. *Ohio*, illegally obtained evidence was admitted in the Courts of this state. In the *Mapp* case the United States Supreme Court said that the Federal exclusionary rule that illegally obtained evidence could not be used in any Court of Law applied to the states. New York State then was faced with the manner in which it would proceed. The legislature enacted Section 813-c of the Code of Criminal Procedure, and the sections following it, under title II-b, but they left to the Courts the question of who had the burden of proof. Then there were a series of cases: *People* v. *Sherry*, 43 M2d, 521; *People* v. *Grossman*, 45 M2d 557; *People* v. *McCall*, 17 N.Y.2d 152, in which the Courts of this state acknowledged that there was an inherent right to suppress regardless of Section 813-c. In *People* v. *McCall* at page 157, the Court stated: "It is open to some doubt whether the statutory remedy afforded by Section 813-c of the Code of Criminal Procedure dealing with unlawful searches and seizures, should apply to eavesdropping under the aegis of an order of a Judge who has power to make it. The section seems to have no literal application.

"Suppression is not a fully effective way to deal with testimony which will come in narrative form. This may require rulings of evidentiary exclusion. The normal way to proceed in the situation presented by this Code would be to decline to receive the evidence obtained by eavesdropping. See following. CPLR 4506."

As a matter of fact, the Court of Appeals has gone so far as to say that Section 813-c would not apply where a defendant pled guilty because of wire tap evidence and then appealed. They made this decision in *People* v. *Habel*,

18 N.Y.2d 148. So, the Court is faced with a determination of the procedure to be followed in this case, and examining the two possibilities: (1) following the procedure that has been established by the Courts under Section 813-c, which is set forth in *People* v. *Lombardi,* 18 App. Div. 2d 177, as modified by *People* v. *Malinsky,* 15 N.Y.2d 86, and (2) where you apply the standards at Common Law that the person attacking the evidence would have the burden of proof, this Court must make an election.

The election that the Court makes is that it will follow the rules of procedure established under Section 813-c. I am sure these rules are clear to the attorneys in this lawsuit, but so that there can be no misunderstanding, I will read from the famous footnote at page 91: "The People in order to prevail are under the necessity of going forward in the first instance with evidence to show that probable cause existed both in obtaining a search warrant and sustaining the legality of the search made without a warrant as incident to an arrest."

In other words, applying it to this case, the People in order to prevail are under the necessity of going forward in the first instance with evidence to show that the evidence to be introduced was not tainted. So much for the procedural question.

* * *

The Court: I have heard arguments on both sides and the question that I must now determine is whether the People have come forward and shown probable cause to believe that the evidence that they are going to present in this case is not tainted by reason of a large number of wire tap orders.

To meet this burden the People called the District Attorney, the Chief Assistant, the Assistant in charge of this investigation, and the detective who made the complaint in this case. They also produced 15 wire tap orders and two unsigned wire tap orders relating to the defendants, or the premises, or people who were indicated would

be witnesses in this case together with summaries of the alleged tapes, the affidavits and testimony which formed the bases for the granting of the orders.

The District Attorney testified that he directed his assistant in charge of racket investigations to put men into the Magic Touch after he had received certain correspondence which is in evidence. The Assistant District Attorney, Norman Levy, who was the head of the Rackets Bureau testified that he examined the correspondence People's Exhibit 23-A, which was a letter dated January 10, 1964, which has been admitted into evidence for purposes of this motion only and the letter provides, after complaining about the Long Beach Inn that . . . "they also have operating next door to them in the Magic Touch what I think you might call a lesbian house which constitutes a large percentage of their business. I have not only seen this with my own eyes but heard about it from authoritative sources. In my estimation I feel this bears some investigation. I think it is a shame that decent people and their children should be permitted or subjected to this type of lodging." Signed, a concerned taxpayer.

Mr. Levy also examined Exhibit 25 in evidence for purposes of this motion only, a letter dated May 2, 1964, which stated:

"Mr. District Attorney: We request your office investigate certain cocktail lounge on Austin Boulevard called The Magic Touch. In the past several months this so-called supper club has become a meeting place for queers, lesbians and minors trying to make some easy money catering to the wants of these people. This bar allows dancing, petting and necking with one's own sex. It is not unusual to see two men or women sitting in a corner kissing and using their hands for immoral actions. These people even have sex in their cars in the parking lot. The Magic Touch was divided into two rooms, the outer is the bar which looks perfectly normal. The back room is used for dancing.

Appendix B

There is a light switch in the outer room which controls certain bright lights in the dance room. Whenever the local police enter the lights are switched on in the back room, which is a signal to stop the unnatural acts. There is quite a few minors going there using false proof of age. These queers also ride up and down Austin Boulevard picking up young people and bringing them to the Magic Touch. The hotel in back of the Magic Touch does a pretty good business too. We think the local police must know about what goes on there. Why they have done nothing about it we don't know. The Magic Touch is busiest on Friday, Saturday and Wednesday nights. We have found out about this place by dressing like queers and going there ourselves. What we have written in this letter are things we have seen ourselves. We hope this matter will be investigated and alleviated. A place like the Magic Touch in this community will only lead to trouble. We thank you for your time and trouble. Sincerely.

/s/ A Citizens' Co."

Now, in addition to these letters, Mr. Levy examined activity sheets which are in evidence as Defendants' Exhibit E. They show that on the 5th of March, 1964, Captain Schuchman and Detective Gillings, saw queers at the Magic Touch and that on the 9th of March, 1964, the activity sheet, which is Exhibit 26 in evidence, shows that the detectives went to the premises and they found no evidence for this case. On the 4th of June, 1964, Exhibit E, the activity sheet, shows Detectives Harrer and Duhigg went to the Magic Touch, saw several males with female tendencies, and on the next night, June 5, 1964, Exhibit E again shows that Detectives Harrer and Duhigg were refused admission to the Magic Touch, and on the 26th of that month, 1964, the same exhibit shows activity negative; but Exhibit 26 in evidence shows that Detective Abramowicz

and Detective Beach were refused admission but queer-looking customers were charged $3 and admitted to the premises. They identified themselves as detectives and were admitted and they noticed many oddballs. On the 2nd of July, 1964, and the 4th of July, 1964, activity sheet, Exhibit 26, shows that the investigation was negative and on the 10th of July, 1964, they noticed that the lights went on in the back room of the Magic Touch, so that what the People have come forward and shown at this time is that they had received correspondence and had conducted an investigation and on the basis of this, Assistant District Attorney Levy upon the instructions of the District Attorney ordered undercover men to enter the premises.

I conclude that the People have now come forward and shown probable cause that the evidence in this case is not tainted, and the defense, of course, if it desires may call such witnesses as it wishes or offer such proof as it may desire to show that there were indeed wire taps which led to the evidence in this case. I might add that the testimony of any witness will be examined where it is shown that wire tap evidence might have led to that witness. This is in accordance with the C.P.L.R. relating to wire taps.

So, to specifically answer your question, Mr. Vitello, I'm ruling that the People need not produce the three detectives who made the taps, but you certainly may have them called as your witnesses if you so desire.

* * *

Dated at Mineola, N. Y.
October 17, 1967

APPENDIX C

(Opinion of District Court of Nassau County on Motion to Suppress Wiretap Evidence)

DISTRICT COURT OF THE COUNTY OF NASSAU

First District—Mineola, N. Y.

Index Nos. CR-1430/65
CR-1431/65
CR-1432/65

—o—

The People of the State of New York,

against

Eddie De Curtis, John Vignini and Daniel Fatico,
Defendants.

—o—

Before:

Hon. John S. Lockman, *District Court Judge*

Decision on Motion

Appearances:

William Cahn, Esq., District Attorney, Nassau County Mineola, N. Y. By: William Dillon, Esq.

George E. Mulry, Esq., Attorney for Defendant DeCurtis, 1551 Franklin Avenue, Mineola, N. Y.

Philip Vitello, Esq., Attorney for Defendants Fatico and Vignini, 50 Court Street, Brooklyn, New York

Appendix C

PROCEDURE

During a non-jury trial for maintaining and conspiring to maintain a disorderly house from January 1, 1964, to June 7, 1965, in violation of Sections 1146 and 580 of the Penal Law and Section 899 of the Code of Criminal Procedure it developed that: (1) testimony had been taken before the Grand Jury concerning the defendants and the operation of the premises in question and (2) there were 12 wiretap orders concerning the defendants and prospective witnesses covering a period from July 10, 1963, to July 22, 1965.

The defendants moved to dismiss for lack of jurisdiction because the People had not produced any Court Order directing the submission of the case to a Court of Special Sessions after a dismissal by the Grand Jury pursuant to Sections 269 and 270 of the Code of Criminal Procedure. The People produced a certificate by the County Court Clerk providing that "no dismissals of charges against Edward DeCurtis, John Vincent, a/k/a John Vignini and Daniel Fatico have been filed in the County Court of Nassau County by any Nassau County Grand Jury during the period checked," which was from January 1, 1959, to September 15, 1967 (People's Exhibit 13 in evidence). The defense requested time to submit authority. Accordingly decision was reserved on this motion.

Since this was the first knowledge the defense had of the wiretap orders they were permitted to move to suppress evidence obtained thereby pursuant to Section 813-c of the Code of Criminal Procedure and under the inherent right to make such a motion at common law (*People* v. *McCall,* 17 N.Y.2d 152; *People* v. *Habol,* 18 N.Y.2d 148; *People* v. *Sherry,* 43 Misc. 2d 521; *People* v. *Grossman,* 45 Misc. 2d 557).

The hearing on this motion took eight weeks. First, the People were required to come forward with evidence

to show that there was no probable cause to believe that the evidence to be introduced at the trial was based directly or indirectly upon wiretaps. They called the District Attorney, his assistant in charge of investigations and the detective who laid this information. They also produced for the defense to examine 12 executed and two unexecuted wiretap orders relating to the defendants, the premises or prospective witnesses, together with the affidavits and testimony used to obtain the wiretap orders and all summaries in their possession of conversations overheard pursuant to the wiretap orders. They also called police and District Attorney personnel to explain efforts to locate missing tapes and summaries.

The District Attorney testified that he directed his investigations chief to put men into the premises in question after receipt of letters complaining of lesbians and "queers" (People's Exhibit 23-A, 25 in evidence). The investigations chief testified that he reviewed the complaint letters and People's Exhibit 26, Defendants' Exhibit E, both in evidence, which were police activity sheets showing observations of many patrons of the premises who appeared to be "queer" over a period from March 5 to July 10, 1964, and on the direction of the District Attorney ordered undercover men into the premises on November 13, 1964.

The defense was then required to prove by a preponderance of the evidence the inadmissibility of the evidence to be introduced at the trial because it was based directly or indirectly upon wiretaps (*People* v. *Lombardi*, 18 A.D.2d 177 as modified by *People* v. *Malinsky*, 15 N.Y.2d 86, 91, Footnote 2).

They called the three detectives who listened to the tapes and the Assistant District Attorney in the Investigation Bureau who was in charge of a parallel investigation and who had obtained the tapes, and they introduced into

evidence most of the wiretap orders, all of the 1964 summaries of wiretap conversations produced by the People and some of the statements given to the police. They were permtited to cross-examine the witnesses as compulsory witnesses (*Richardson on Evidence,* 9th Edition, Section 525).

The People were also required to produce for examination by the defense all statements, Grand Jury testimony of every witness and anything which (1) would refresh the witness' recollection or (2) was of an exculpatory nature or (3) would assist the defense in its defense or (4) would tend to establish that any evidence was obtained in violation of the constitutional rights of the defendants pursuant to *People* v. *Rosario,* 9 N.Y.S.2d 286; 213 N.Y.S.2d 448; *People* v. *Agron,* 10 N.Y.2d 130; *People* v. *Miller,* 257 N.Y. 54, and the broad language of *People* v. *Walsh,* 262 N.Y. 140, 150: "The state has no interest in interposing any obstacle to the disclosure of the facts unless it is interested in convicting accused parties on the testimony of untrustworthy persons."

At the request of the District Attorney who wished to avoid the possible commission of a crime under Section 215.70 of the Penal Law which prohibits disclosure of Grand Jury testimony except in the proper discharge of official duties or upon written order of the Court, this Court made application to the County Court for such a written order which was obtained.

After introducing testimony that there were no wiretap orders other than those produced, the People were not required to produce their list of wiretap orders because of the privilege protecting official information (*People* v. *Keating,* 286 A.D. 150; 141 N.Y.S.2d 562; *Richardson on Evidence,* 9th Edition, Section 468).

Once it was determined that these lists of wiretap orders were readily identifiable should an appellate court wish to examine them if that stage were ever reached, the People's

representation that these lists were of such a confidential nature that not even the Court should see them was accepted at face value.

The application by the defense for the production of Grand Jury testimony of witnesses not called (although their names and addresses were made available to the defense) for the purpose of establishing perjury by those witnesses was denied. The reason for the denial was that those witnesses were indicted for perjury and the People conceded that this alleged perjury was the denial of remembering ever reporting to law enforcement that the defendant DeCurtis said he owned the premises in question. This report had been introduced to show that the People knew, independently of the wiretaps which also revealed this information, that DeCurtis owned the subject premises. The defense's argument that it need not call the witnesses prior to the production of their testimony, as suggested by the Court, because those witnesses would refuse to testify on the grounds that their testimony might tend to incriminate them was rejected as speculative.

A former Assistant District Attorney was permitted to testify, over objection by the defense, to a conversation with an informer without revealing the identity of that informer even though he had never furnished information before because the information supplied on this occasion was subsequently confirmed (*People* v. *Malinsky,* 15 N.Y.2d 86; *People* v. *White,* 16 N.Y.2d 270; *People* v. *Swanberg,* 16 N.Y.2d 648).

Decision was reserved on a motion by the defense that the informer be identified so that he could be produced as a defense witness on a vital issue, the burden of which rested with the defense—proving that the evidence to be introduced at the trial was not based upon the alleged informer's conversation but, instead, was based upon wiretaps.

Appendix C

Decision was also reserved on a motion by the defense for a mistrial because of prejudicial material included in the evidence which the defense was required to produce to attempt to sustain its burden of proving that the evidence to be used at the trial was based upon wiretaps.

Before ruling on the issues thus presented, it is necessary to make the following:

FINDINGS OF FACT

The crimes charged allegedly occurred between January 1, 1964, and June 7, 1965. Six months before, during, and a year after this period 12 wiretap orders were obtained against the defendants, prospective witnesses or the subject premises, the Magic Touch. The 1963 wiretaps were obtained as part of an investigation into possible prostitution at the Magic Touch. The other wiretaps were obtained to assist in an investigation of a fire which destroyed The Flame, a competitor of the Magic Touch whose owners were suspect of the arson.

A search everywhere the tapes and transcripts could be kept was unsuccessful. They were never found. An explanation was offered for each set of tapes: the 1963 tapes were lost when the Detective Squad responsible was transferred from the District Attorney's office to Police Headquarters; the 1964 tapes were ordered erased, were last seen in the erasure room and presumably were erased in accordance with the custom of erasing useless tapes in order to use them again and because the District Attorney did not "want to perpetuate conversations of negative tapes." No tapes were made in 1965 because the calls were "live monitored."

No transcripts were found and no one recalled making any. However, summaries of the tapes were produced for the 1963 and 1964 wiretaps. The 1964 summaries were

introduced into evidence by the defense. They dramatize the scope of wiretaps. One hundred and sixty summaries were made, many of which were several pages long. In addition to much gossip, personal information and irrelevant material, they revealed that lesbians and homosexuals frequented the Magic Touch where the defendant Vignini was the bouncer and which was under the control of the defendant DeCurtis, who also controlled other "restaurants," The Mask, one in Staten Island, possibly Baps. They also showed that "Danny" (same first name as the defendant Fatico) apparently worked as a tailor during the day and had some connection with the Magic Touch, that "Jiggst" was the bartender at The Mask and that Pitsy, May Bush, Lorraine "Laurie" Todero apparently worked for DeCurtis.

The most important information revealed by the tapes was notations of conversations overheard on the telephone at the DeCurtis residence set forth in Exhibit M:

> "Summary 80, Oct. 14, 1964, OUT MO 6-4200. Male (Barry) '4200,' Hello Barry, he's on his way, OK.
>
> "Summary 82, Oct. 16, 1964. OUT Theresa calling MO 6-4200. 4200 Barry, Eddie on phone, heard she was looking for him will be home. 255-6356 (Eddie DeCurtis brothers)."

This was vital information because MO 6-4200 was the telephone number of the Mask, and the next day, on October 17, 1964, Detectives Sondergaard and Eberhardt went to The Mask to see DeCurtis and while there Eberhardt learned that "Jiggs" the bartender and "B.J." worked there. This information furnished the key to Eberhardt's subsequent undercover entry into The Magic Touch, which restricted admission, because the doorman refused him

admission until he told him that the knew "Jiggs" and "B.J." from The Mask.

However, a former Assistant District Attorney, Dowling, rebutted the implication that the wiretaps led the prosecution to The Mask. He testified that an informer, whose identity he refused to reveal, told him on October 8, 1964—six days before the information was received from the wiretaps—that the defendant DeCurtis was opening the Mask, a bar for homosexuals; B.J. was the bartender and Maggie Jiggs, another employee, was a male who impersonated females or vice versa; Pitsy ran the Mask and the Magic Touch; B.J. was her chauffeur; when Pitsy was not at the Magic Touch John Vignin ran it.

Such testimony based upon a conversation with an unidentified informer and *coming at the end* of all testimony *after* Dowling himself had testified at length has been carefully scrutinized since it rebuts *vital* proof by the defense that wiretaps had furnished the lead to the evidence. The Court has not disregarded the prosecution's lack of enthusiasm in cooperating with the defense in its attempt to prove something solely within the knowledge of the People—that the evidence was tainted.

Nevertheless, Dowling's testimony stands upon the rock of integrity. With nothing to gain and so much to lose it is unbelievable that this attorney would lie. Exhaustive cross-examination over many days did not shake his testimony. It is that of an honorable man. It is *believed.* Actually the People were well-informed about the defendants independently of any wiretaps. In the winter of 1964 an anonymous letter described a "lesbian house" at the Magic Touch. A second letter gave details:

"May 2, 1964

"Mr. District Attorney,

"We request your office investigate a certain cocktail lounge on Austin Boulevard called the Magic

Touch. In the past several months, this so called supper club has become a meeting place for queers, lesbians and minors trying to make some easy money catering to the wants of these people. This bar allows dancing, petting and necking with ones own sex. It is not unusual to see two men or women sitting in a corner kissing and using their hands for immoral actions. These people even have sex in their cars in the parking lot. The Magic Touch is divided into two rooms, the outer room is the bar which looks perfectly normal. The back room is used for the dancing, there is a light switch in the outer room which controls certain bright lights in the dancing room. Whenever the local police enters, the lights are switched on in the back room which is a signal to stop any unnatural acts. There is quite a few minors going there using false proof of age. These queers also ride up and down Austin Blvd. picking up young people and bringing them to the Magic Touch. The Motel in back of the Magic Touch does a pretty good business catering to these people too. We think the local police must know about what goes on in there. Why they have done nothing about it we do not know. The Magic Touch is busiest on Friday, Saturday and Wednesday nights. We have found out about this place by dressing like queers and going there ourselves. What we have written in this letter are things we have seen ourselves. We hope this matter will be investigated and alleviated. A place like the Magic Touch in this community will only lead to trouble. We thank you for your time and trouble.

Sincerely,

A Citizens Co."

Appendix C

As a result the licensees, Thomas and Anthony Cesiro were told to properly supervise the premises and an investigation revealed that on March 5 and June 4 of 1964 "queers" were seen at the Magic Touch.

Activity—Friday, June 26, 1964

Excerpts from Exhibit 26 show:

> "On this date, Detective F. Abramowicz & W. Beach, assigned and present at the Magic Touch at 2315 hours. As writers attempted to enter the bar, they were stopped by a couple of male persons who stated that the premises were closed to the writers and a private was in progress. While writers were standing on the porch two negroes and one white male, apparently queer walked up to the door and each was charged three dollars and admitted. Writers then identified themselves as Police Officers, and walked into the bar and sealed off dance room which was crowded with an assortment of oddballs. At this point the manager was summoned and brought Detectives to his office. His name was John Vignini, 14 Striker Street, Brooklyn, N.Y. He stated that the Magic Touch is owned by Anthony Cicero, 333 Lawrence Avenue, Oceanside, N.Y. He further stated that on the weekends three dollars is charged for each person entering the Tavern. The party is given two tickets entitling him to any drink in the house. On weekend all drinks are $1.25. He does this, he claims to keep out trouble makers from Long Beach. After the premises were inspected with negative results, writers at 0300 left on another assignment. Persons interviewed also stated that the Magic Touch was always open to the authorities for any inspections which are deemed necessary."

Appendix C

Activity—Thursday, July, 1964

"Detectives Moriarty and Duhigg were assigned to this case. Detectives entered the premises at 2345 hours after being stopped at the door by John Vignini, mgr. and were told that they had a private party. Detectives identified themselves and entered with the mgr. 'There were about seven people at the bar both male and female. The detectives then went into the back room where three tables containing two males each were sitting. Detectives then went back to the bar and started talking to a male about 40 years who said that he had been on the job in N.Y.C. and was practicing attorney. He said that he had worked for D.A. O'Connor's office in Queens. He showed an identification card with his picture and name Maurice Berkowitz, Investigator. He apparently was friendly with John Vignini, the mgr."

Activity—July 10, 1964.

"On this date Dets. Gillings and Sheridan present at location said officers were met at the door by a person who later identified himself as John Vignini of 14 Striker Court B'klyn. who stated that he was the manager. Vignini attempted to stop the said officers and the officers were told that the general public was not allowed in as it was a private party. Det. Gillings entered the rear room and found it crowded with black and white males dancing with one another and the lights turned up bright. Det. Gillings questioned the manager as to the reason why the lights are put on in the back room when a stranger enters, he denied any knowledge of this situation. When Det. Sheridan passed the bar he overheard a customer state that the lights are on in the back room. Det. Sheridan

identified himself to this person who ran from the premises into a swamp and the officers looked for this individual with negative results. Vignini was warned to stop the carrying on at the premises and they left on another investigation. On July 12, 1964 Det. Gillings notified Mr. Bolsulm "of S.L.A. of the situation, who stated that if this office could prove that there was no private party he would take necessary action against the licensee. dlg."

Activity—Oct. 6, 1964

"On this date Captain Schuchman and Detective Moriarty interviewed the owner of the Flame, Atlantic Avenue, which had been set on fire the morning of October 5, 1964. Nat Warshaw of Felter Avenue, Hewlett, N. Y. stated that he was of the opinion that it had some connection with the Magic Touch as since they opened up three weeks previously they had taken most of their customers. He suspected the owner of the Touch Big Eddie of being behind the fire. J.M."

It is understandable that the owners of The Flame were suspicious. Not only had a fire destroyed another "restaurant" of theirs, they had been threated with extortion followed by malicious mischief, a robbery and the burning of The Flame. Right after the fire, early in October, 1964, they told Dowling that DeCurtis had told them he owned the Magic Touch. They felt that since the Magic Touch gained from their loss, its owners were prime suspects.

They certainly had nothing to back up this suspicion. The wiretaps on their business and residence establishes this. They were so unreliable that eventually they were indicted for perjury because they told the Grand Jury that they couldn't remember telling Dowling DeCurtis told them he owned the Magic Touch.

Appendix C

Included in these findings are two appendices, (i) a list of exhibits, (ii) a chronology.

CONCLUSION OF LAW

No evidence, direct or indirect, based upon eavesdropping or wiretaps can be introduced in Courts of this State since Section 813(c) of the Code of Criminal Procedure which authorizes eavesdropping and wiretaps has been declared unconstitutional as an unreasonable invasion of privacy in violation of the Fourth Amendment of the Constitution because it is a "broadside authorization" for a "general search" the use of which "was a motivating factor behind the Declaration of Independence." (*Berger* v. *New York*, 87 S.Ct. 1873, 1883; *Mapp* v. *Ohio*, 376 U.S. 643; *People* v. *Grossman*, 20 N.Y.2d 346; *People* v. *Cline*, 286 N.Y.S.2d 318.)

Even without *Berger*, no wiretap-based evidence would be admissible in this case because (1) an order prohibiting evidence directly or indirectly based upon wiretap was entered by County Judge Kelly based upon the People's affidavit in opposition to a motion to inspect the wiretaps that "no wiretap evidence will be used in this case," and (2) the People elected to exercise a public policy privilege (*People* v. *Keating*, 286 A.D. 150; 141 N.Y.S. 2d 502; *Richardson on Evidence*, 9th Edition, Section 468) against divulgence of the location of the wiretaps thereby preventing a determination of whether a trespass was involved in the tapping of the defendants' phones and relegating the People to a position where wiretaps would not be permitted because of the possible trespass (*Silverman* v. *U.S.*, 365 U.S. 505).

However, where, as in this proceeding, the People establish that their evidence was obtained independently of wiretaps, such evidence is admissible (*Nardone* v. *U.S.*,

308 U.S. 338). It is impossible at this stage to determine whether some witnesses might have been located through wiretaps. Accordingly, before accepting testimony of witnesses whose identity is not apparent on the face of the record, such as police officers, the People must come forward with proof that the witness was not indirectly the product of wiretaps, which proof the defense will be permitted to attempt to overcome (*People* v. *Malinsky, supra*).

The motion to suppress the evidence on the grounds that the defense has been deprived of a complete hearing in that it has been unable to call the informer who told Dowling about The Mask is also denied. Although defendants are entitled to the disclosure of information within the knowledge of the prosecution which will assist in presenting a defense, such disclosure is restricted where the public interest is better served by protecting the informer. Thus, "the necessities of effective law enforcement can prevent the defense from obtaining a pre-trial statement" (*People* v. *Rosario,* 9 N.Y.2d 286, 290).

Each case must be examined to determine which interest is entitled to prevail—individual or public. Here the public interest of protecting the informer outweighs the individual interest of *attempting* to locate a witness who, if he testifies truthfully, beyond a doubt will *confirm* the testimony of Dowling and hurt rather than help the defense (*People* v. *Malinsky; People* v. *White; People* v. *Swanberg,* all *supra; People* v. *Ray,* 26 A.D.2d 560).

Also denied is the motion to dismiss for lack of jurisdiction because the People did not comply with Section 270 of the Code of Criminal procedure which requires a Court Order before trying a charge that has been dismissed by the Grand Jury. The record shows that there has been no Grand Jury dismissal. Without such a dismissal, Grand Jury hearings do not affect jurisdiction in this Court of

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Special Sessions (*People* v. *Kelly*, 140 Misc. 377, 250 N.Y.S. 619).

Likewise the motion for a mistrial because the defendants, in attempting to prove that evidence was obtained through wiretaps, were obliged to introduce wiretaps summaries containing gossip, hearsay and other prejudicial material inadmissible at a trial is denied (Section 14, Judiciary Law).

The motion to suppress is denied.

Dated at Mineola, New York
November 30, 1967

/s/ JOHN S. LOCKMAN
District Court Judge

APPENDIX D

(Opinion in Support of Verdict of Trial Court)

DISTRICT COURT OF THE COUNTY OF NASSAU

First District: Mineola, N. Y.

Index Nos.: CR-1430/65
CR-1431/65
CR-1432/65

———o———

The People of the State of New York,

against

Eddie De Curtis, John Vignini and
Daniel Fatico,

Defendants.

———o———

Before:

Hon. John S. Lockman,
District Court Judge

Decision After Trial

Appearances:

William Cahn, Esq., District Attorney, Nassau County, Mineola, N. Y. By: William Dillon, Esq.

George E. Mulry, Esq., Attorney for Defendant De Curtis 1551 Franklin Avenue, Mineola, N. Y.

Philip Vitello, Esq., Attorney for Defendants Fatico and Vignini, 225 Broadway, New York, N. Y.

Appendix D

The Charge

A four-count information charges that three defendants, acting in concert and aiding and abetting each other (1) conspired to violate Section 1146 of the Penal Law which prohibits disorderly houses; (2) maintained such a disorderly house; (3) received persons for purposes of lewdness in violation of Section 887 of the Code of Criminal Procedure (vagrancy), and (4) violated Section 899 of the Code of Criminal Procedure which prohibits the maintenance of a bawdy house and house for the resort of disorderly persons.

The Facts

After careful evaluation of the testimony of all witnesses, reconciliation of contradictions and inconsistencies, and based upon the appearance and demeanor of the witnesses, beyond a reasonable doubt, the trial record establishes the following:

Three undercover detectives, appropriately dressed, gained access to the premises in question, the Magic Touch, by convincing one of the defendants, Fatico, whose job as doorman was to keep strangers out, that they knew acquaintances of Fatico.

On each of their eight visits to the premises between November 13, 1964, and June 6, 1965, the detectives purchased tickets at the door which they exchanged at the bar for drinks. They then entered a large rear room where they observed a large number of both sexes with members of the same sex dancing, kissing, fondling the breasts and private parts, and placing the tongue inside the mouth of each other. Each of the defendants was observed present at some time while these lewd actions were occurring. Two of the defendants, Fatico and Vignini, also known as Vincent,

were observed on every visit to the premises. The other defendant, DeCurtis, was seen twice. The second time, on February 26, 1965, he watched the three detectives purchase their tickets from the doorman Fatico and as they entered DeCurtis called, "Hey." Vignini then went to DeCurtis and explained that it was all right, these were nice boys who had been there before.

Prior to this, in the fall of 1964, DeCurtis had asked a witness, Fletcher, why he was discussing the rent of the Magic Touch and promoting one of its competitors. When Fletcher answered that he had been offered a job by the competitor, DeCurtis asked why he hadn't asked him, DeCurtis, for a job. Fletcher volunteered that Magic Touch business would be better with a different manager. DeCurtis responded that, "as far as Johnny Vincent is concerned, I'll take care of it."

For approximately one year prior to April, 1965, Fletcher had visited the Magic Touch. He had seen Vignini there and on three occasions Fatico and DeCurtis, including once when the premises were closed and DeCurtis was present.

On their first visit, November 13, 1964, the detectives notice dthat when they entered the rear room the bright lights went on, shuffling was heard and dancing resumed only when the lights were dimmed. On their third visit on January 8, 1965, while the detectives were in the rear room the bright lights went on and the dancers exchanged partners and discontinued their lewd actions so that females were dancing with males in an orderly manner. When the lights were dimmed they returned to their former partners of the same sex and resumed their lewd activities.

On their final visit, on June 6, 1965, while in the rear room the detectives again observed the bright lights go on, the exchange of partners, and saw three uniformed police officers inspecting the premises. It was during this inspection that Vignini identified himself as the manager and

ticket taker. After the police left the lights were dimmed and Vignini said, "It's all right, they are gone; continue on and have fun."

THE LAW

At the conclusion of the People's case, the defense requested the identity of an informer whose information led the police to the Mask, a public bar where they learned the names used to gain admittance to the Magic Touch. This identity was requested so that the informer could be subpoenaed as a defense witness.

This request is denied. Where information is subsequently confirmed, as in this case, the informer need not be identified even though his prior reliability was not established (*People* v. *Coffey,* 12 N.Y.2d 443; 240 N.Y.S.2d 721; *People* v. *Santiago,* 13 N.Y.2d 326; 247 N.Y.S.2d 473; *People* v. *Malinsky,* 15 N.Y.2d 86; *People* v. *White,* 16 N.Y. 2d 648; *People* v. *Ray,* 26 App. Div. 2d 560).

The defense moved to dismiss the information on three grounds:

(1) The information was jurisdictionally defective since it was drawn in the conjunctive charging the defendants with keeping a house of ill-fame *and* assignation *and* lewdness *and* other indecent *and* disorderly *and* obscene purposes.

(2) There was a merger of the conspiracy charge with that of keeping a disorderly house which also merged with the vagrancy count.

(3) The People failed to prove the defendants' guilt beyond a reasonable doubt.

The first two grounds have no merit. (1) *People* v. *Harrison,* 40 M.2d 601; 243 N.Y.S.2d 432; *People* v. *Pat-*

rick, 175 M. 997; 26 N.Y.S.2d 183; *People ex rel. Krohn* v. *Thomas*, 133 M. 145; 231 N.Y.S. 271; *People* v. *Haverty*, 21 M.2d 198; 191 N.Y.S.2d 34. (2) *People* v. *Erickson*, 171 M. 937; 13 N.Y.S.2d 997. Reversed on other grounds, 283 N.Y. 210, reargument denied, 283 N.Y. 774; *People ex rel. Sivers* v. *McGee*, 166 M. 379; 2 N.Y.S.2d 500; *People ex rel. Thorton* v. *Becker*, 188 M. 181; 66 N.Y.S.2d 804; *People* v. *Tavormina*, 257 N.Y. 84.

The third ground requires analysis of the individual counts.

I. Conspiracy

Conspiracy requires (a) an agreement (b) to knowingly and intentionally (c) commit a crime or act injurious to public morals and (d) some overt act in furtherance of the agreement.

A conspirator need not be a party to the original agreement provided he subsequently knowingly confirms the agreement. The agreement can be inferred from behavior. Such an inference may certainly be drawn from the fact that the defendant knowingly permitted homosexuals and lesbians to gather for lewd purposes. This inference is reinforced by the defendants' efforts to conceal the activities at the Magic Touch by restricting attendance to known patrons and by the installation of a warning system.

However, inferences consistent with innocence can also be drawn. The defendants may have planned to cater to homosexuals without any plan that the homosexuals behave lewdly. Or, the defendants may have become associated with the operation after it was in full fruition. They may have participated without any agreement.

It is fundamental that inferences consistent with innocence must be adopted. Accordingly, the motion to dismiss the conspiracy is granted.

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II. Keeping A Disorderly House

Section 1146 of the Penal Law prohibits "a house of ill fame or assignation of any description or a *place for the encouragement or practice by persons of lewdness,* fornification, unlawful sexual intercourse *or for any other indecent or disorderly act or obscene purpose there . . .*" (Emphasis added.)

The course of conduct at the Magic Touch knowingly permitted by the defendants violated this clear language. Motion denied.

III. Vagrancy

"Section 887, C.C.P. Who are vagrants

"The following persons are vagrants. . . .

"4. A person . . . (e) who receives or offers or agrees to receive any person into any place, structure, house, building or conveyance for the purpose of prostitution, lewdness or assignation or knowingly permits any person to remain there for such purposes. . . ."

Since the defendants knowingly permitted persons to remain at the Magic Touch for purposes of lewdness this motion is denied.

IV. Disorderly Persons

"Section 899. Who are disorderly persons

"The following are disorderly persons:

"1. Persons who actually abandon their wives or children, without adequate support, or leave them in danger of becoming a burden upon the public, or who neglect to provide for them according to their means;

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"2. Persons who threaten to run away, and leave their wives or children a burden upon the public;

"3. Persons pretending to tell fortune, or where lost or stolen goods may be found; but this subdivision shall not be construed to interfere with the belief, practices or usages of an incorporated ecclesiastical governing body or the duly licensed teachers or ministers thereof acting in good faith and without personal fee, nor shall it be construed to prohibit or prevent any show, trick, feat, display, or other act or exhibition, performed by a magician or mentalist for purposes of amusement or entertainment and without personal fee;

"4. Keepers of bawdy houses or houses for the resort of prostitutes, drunkards, tipplers, gamesters, habitual criminals, or other disorderly persons;

"5. Persons who have no visible profession or calling, by which to maintain themselves, but who do so, for the most part, by gaming;

"6. Common showmen and mountebanks, who exhibit or perform for profit idle shows, acts or feats;

"7. Persons who keep, in a public highway or place, an apparatus or device for the purpose of gaming, or who go about exhibiting tricks or gaming therewith in a public highway or place;

"8. Persons who play, in a public highway or place, with cards, dice—or any other apparatus or device for gaming;

"9. Habitual criminals within the provisions of this code."

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This statute is penal and must be strictly construed (*People* v. *Butler*, 18 M.2d 904; 187 N.Y.S.2d 877).

The only enumerated subdivision applicable to this action is (4) and within this subdivision the only categories applicable are "bawdy houses" and "other disorderly persons."

A bawdy house is a house operated by a bawd. *Webster's International Dictionary, Third Edition*, defines a bawd as, "1. Go-between, pander. 2. (a): one who keeps a house of prostitution; madam; (b): prostitute," and a bawdy house as a brothel. This definition is confirmed by *Black's Law Dictionary*, and *Words & Phrases*. The Magic Touch does not come within this definition.

"Other disorderly persons" whom strictly construed under a statute commencing, "Who are disorderly persons. The following are disorderly persons:" must mean disorderly persons as defined under that statute.

Section 238, Statutes, provides, ". . . Where words of specific or inevitable purport are followed by words of general import the application of the last phrase is generally confined to the subject matter disclosed in the phrases with which it is connected . . ." This is a codification of the common law doctrine of *noscitur a sociis* (it is known from its associates) and *ejusdem generis* (of the same kind). Under these rules of construction the defendants were not disorderly persons and the motion to dismiss this count is granted.

The defendants are found guilty on counts II and III and are directed to appear at the Criminal Part Clerk's office not later than 2:00 P.M. on or before February 2, 1968, for processing by the Probation Department preliminary to sentencing on February 29, 1968.

Dated at Mineola, N. Y.
January 29, 1968

/s/ JOHN S. LOCKMAN
District Court Judge

APPENDIX E

(Memorandum Opinion of the Appellate Term of the Supreme Court, Second Judicial Department)

Supreme Court, Appellate Term, Second Department
May 6, 1970

MEMORANDUM

PER CURIAM.

Judgments of conviction unanimously affirmed.

Defendants were charged with keeping a disorderly house during 1964 and 1965, in violation of section 1146 of the former Penal Law, and of vagrancy, in violation of former section 887 of the Code of Criminal Procedure.

Section 1146 of the former Penal Law provided in pertinent part:

> "§ 1146. *Keeping disorderly houses.*
>
> Whosoever shall keep or maintain a house of ill-fame or assignation of any description or *a place for the encouragement or practice by persons of lewdness,* fornication, unlawful sexual intercourse *or for any other indecent or disorderly act or obscene purpose therein* or any place of public resort at which the decency, peace or comfort of a neighborhood is disturbed shall be guilty of a misdemeanor. . . ." (Emphasis supplied.)

Former Section 887 of the Code of Criminal Procedure defined a vagrant as follows:

> "4. A person * * * (e) who receives into any place, structure, house, building or conveyance for the purpose of prostitution, *lewdness* or assignation or knowingly permits any person to remain there for such purposes * * *." (Emphasis supplied.)

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There is ample evidence in this voluminous record to establish defendants' guilt of both charges beyond a reasonable doubt. The testimony of the police officers was uncontroverted. On eight separate occasions they made personal observations inside the Magic Touch, a restaurant in Island Park, Nassau County, where they observed lewd, indecent and disorderly homosexual activities within the condemnation of both statutes.

In *Matter of Becker* v. *New York State Liquor Authority* (21 N Y 2d 289), cited by both sides, the conduct of the patrons was quite similar to that here involved. Although that case concerned itself with the suspension of a liquor license under the Alcoholic Beverage Control Law, the language of the Court of Appeals is particularly apropos. Said the court (at p. 292):

> "... [A] line must be drawn somewhere between which sexual acts are to be permitted in public places and which are not. In our view, the line must be drawn at public feeling of private parts. In this regard, we would not distinguish between the activities of homosexuals and that of heterosexuals. *Fondling of the primary sexual organs in licensed premises on a public dance floor clearly constitutes disorder whether between heterosexuals or homosexuals* under subdivision 6 of section 196 of the Alcoholic Beverage Control Law." (Emphasis supplied.)

It is to be noted that former section 887 of the Code of Criminal Procedure applied equally to prostitutes and homosexuals. Subdivision 4 thereof encompassed within its language lewd conduct of homosexuals (*People* v. *Hale*, 8 N Y 2d 162).

We find no merit in the contention that a dismissal of the information is mandated because of an alleged spolia-

tion of vital items of evidence. The destruction of blank negatives of photographs and wiretap tapes, under the circumstances related at the trial, could in no way affect the innocence or guilt of the defendants or give rise to any inference, one way or another, and in fact involved no evidence at all. Hence there was no spoliation of evidence in the accepted sense.

Nor is there any merit to the argument based upon the People's alleged use of evidence obtained directly or indirectly through illegal wiretaps. It is clear from the record that the judgments of conviction are not bottomed upon wiretap evidence but rather upon information given to the police shortly prior to the issuance of the wiretap orders and upon the personal observations of eye-witnesses who testified at the trial. The situation at bar is readily distinguishable from *People* v. *Betts* (272 App. Div. 737, affd. 297 N.Y. 1000), cited by defendants, where the evidence was based entirely on wiretaps which were destroyed. In any event, even if the wiretaps had been used or relied upon, which is not the case here, they would afford no basis for invalidating the convictions (*People* v. *Kaiser*, 21 N.Y 2d 86, affd. 394 U.S. 280).

The trial court's failure to compel the identity of an informer was neither prejudicial nor a denial of due process. The conviction of the defendants was based upon the eye-witness' testimony of three detectives and not upon any information supplied by the alleged informer. In these circumstances, non-disclosure cannot be said to have deprived the defendants of a fair trial (see *People* v. *Malinsky*, 15 N Y 2d 86, 93-94).

The further point is made that the trial court lacked jurisdiction to try the informations and impose sentence, predicated upon the alleged failure of the Grand Jury of Nassau County to indict the defendants. Sufficient appears herein to indicate that the Grand Jury did not con-

sider any evidence relating to the charges under consideration but concerned itself with another crime. The County Clerk's certificate indicated that there had been no indictment or dismissal by the Grand Jury. It is noted that the dismissal of a charge must be evidenced by definite action on the part of the Grand Jury in accordance with the requirements of Section 269 of the Code of Criminal Procedure (*People* v. *Kelly,* 140 Misc. 377).

Defendants' final argument is that the trial judge should not have presided both at the hearing on the motion to suppress evidence and at the trial. Since this was a non-jury trial, it suffices to say that there is no prohibition against the same Judge conducting a pre-trial hearing as well as the trial itself (see *People* v. *Brown,* 24 N Y 2d 168; *People* v. *Sykes,* 22 N Y 2d 159).

Upon the entire record, we are satisfied that the trial court was most meticulous in safe-guarding the constitutional rights of the defendants and that their guilt was established beyond a reasonable doubt.